

UNITED STATES OF AMERICA

VS.

FEDERAL MARITIME COMMISSION

IN MATTER OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FROM ORDER OF THE  
CERTIORARI GRANTED JUNE 1, 1962

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, PETITIONER,

*vs.*

FEDERAL MARITIME COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,366

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PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME BOARD and  
THE UNITED STATES OF AMERICA, Respondents,  
FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

---

No. 16,369

---

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME BOARD and  
THE UNITED STATES OF AMERICA, Respondents,  
PHILIP R. CONSOLO, Intervenor.

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Petition for Review of an Order of the  
Federal Maritime Board

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Supplemental Joint Appendix—Filed December 7, 1961

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[fol. 248]

BEFORE THE FEDERAL MARITIME BOARD

HERMAN GOLDMAN  
Attorney & Counselor At Law  
Equitable Building  
120 Broadway

Tel. REctor 2-5535

Cable Address:

"Goldenlaw"

New York 5, N.Y.

February 6, 1959

Federal Maritime Board  
Washington 25, D.C.

Re:

Docket No. 827—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.

Docket No. 835—Flota Mercante Grancolombiana, S.A.  
—Carriage of Bananas from Ecuador to the United States.

Docket No. 841—Banana Distributors, Inc. v. Flota Mercante Grancolombiana, S.A.

Gentlemen:

Pursuant to §201.230 of the Rules of Practice and Procedure request, on behalf of Panama Ecuador Shipping Corporation, is hereby made for an enlargement of fifteen (15) days time within which to file exceptions and a brief in support thereof to the decision recommended by Examiner C. W. Robinson, which said decision was served on February 4, 1959.

The enlargement of time which is requested is urgently required adequately to deal with such recommended decision for the reason that the premises upon which the decision proceeds are, I believe, contrary to or without foundation in the record. In order to establish that such is the

case, and to comply with the requirements contained in §201.228 of the Rules, and specifically the requirements therein contained that alleged errors be stated with particularity and with references to the pages of the transcript and exhibit numbers, it is necessary that the transcript of the proceedings, which numbers approximately 1900 pages, and more than 100 exhibits be carefully considered.

[fol. 249] I believe that the substantial interest of Panama Ecuador Shipping Corporation in these proceedings cannot adequately be conserved or protected if in the preparation of exceptions and brief in support thereof the time to file such exceptions and brief is limited to the fifteen (15) day period provided by §201.228.

Apart from the foregoing consideration the enlargement of time is sought for the further reason that Elias Rosenzweig, who is the attorney in my office who has had charge of and is most familiar with this matter, will, apart from other previously scheduled business engagements, be engaged within the balance of the fifteen (15) day period remaining under §201.228 in (a) a trial of an action of an expected two days duration, (b) a hearing in an arbitration proceeding which it is anticipated will consume one day, and (c) at least two examinations before trial in actions now pending in the United States District Court for the Southern District of New York which examinations will consume the better part of two days.

It is, therefore, respectfully submitted that the enlargement of time herein requested be granted and that the time of Panama Ecuador Shipping Corporation to file exceptions, and brief in support thereof, to the recommended decision be extended to and including March 6, 1959.

Respectfully submitted,

Herman Goldman

Attorney for

Panama Ecuador Shipping Corporation

## BEFORE THE FEDERAL MARITIME BOARD

February 10, 1959

Mr. James L. Pimper  
Secretary  
Federal Maritime Board  
Washington 25, D. C.

Re: Dockets 827, 835, 841

Dear Mr. Pimper:

This refers to Mr. Goldman's letter of February 6, 1959, on behalf of intervener, Panama Ecuador Shipping Corporation, requesting an enlargement, until March 6, 1959, of the time within which to file exceptions in these proceedings. We oppose the request, for the following reasons:

[fol. 250] (1) The letter asserts that additional time is required so that the record may be "carefully considered." But Panama Ecuador submitted a 50-page brief to the Examiner which cites the record in great detail. It thus would appear that most of the work already has been done.

(2) Panama Ecuador re-intervened in these proceedings at a late stage during the hearing (after once successfully demanding that it be let out of the case). Its petition for intervention was granted at the hearing only after the Examiner received assurances that the late intervention would create no delays (Tr. 1048-53). The delay now sought is in direct conflict with representations made in the petition for intervention. As a late intervener, Panama Ecuador's interest in delay must be subordinated to the interests of complainant, Philip R. Consolo, who is still being denied the right to ship via Grancolombiana in defiance of two prior decisions of the Board.

(3) The letter states that Mr. Rosenzweig has commitments which will occupy a portion of his time during the balance of the 15-day period remaining before exceptions are due. We would like to accommodate counsel, if it were possible to do so without jeopardizing the interests of our

client. However, since the conflicting engagements will consume only a fraction of the 15-day period, we must oppose any extension of time. Inasmuch as the record already has been fully briefed, no convincing reason is shown why exceptions may not be prepared in the period allowed.

Very truly yours,

Robert N. Kharasch  
William J. Lippman

Attorneys for Complainant  
Philip R. Consolo

cc. All counsel

[fol. 251]

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BEFORE THE FEDERAL MARITIME BOARD

April 2, 1959

James L. Pimper, Esq.  
Secretary  
Federal Maritime Board  
Washington 25, D. C.

Re: Docket Nos. 827, 835, 841

Dear Mr. Pimper:

~~This refers to the notice setting these proceedings for oral argument before the Board on June 10, 1959.~~

In the circumstances of this case, the delay of more than two months would be highly prejudicial to the interests of our client. We therefore request that the date be advanced so that the argument may be held at the Board's earliest convenience, for the following reasons:

(1) Consolo's complaint has been pending since November 15, 1957. The complaint alleges unlawful exclusion from shipping facilities. Any unreasonable delays in the final decision, therefore, serve to perpetuate the exclusion

—found by the Board in *Consolo v. Grace Line*, 4 F.M.B. 273, and *Banana Distributors v. Grace Line*, 5 F.M.B. —, and by the Examiner in his recommended decision in this case to have been unlawful.

(2) Since his complaint was filed, complainant has diligently prosecuted it before the Board. Respondent Gran-colombiana also has expressed an interest in obtaining a speedy determination of the issues, perhaps with a view to minimizing reparations. Intervener Panama Ecuador, however, is now and for several years has been monopolizing the refrigerated facilities. Its participation in the case has been characterized by repeated attempts at delays. A further long delay for oral argument thus amounts to a windfall to Panama Ecuador, and grants it an extension of its monopoly.

Because most of the issues in this case have previously been considered by the Board, a relatively brief and simple oral argument is required.

If any early argument is at all possible, we urge that in [fol. 252] the interest of justice, to avoid real prejudice to a diligent litigant, the case should be set for quick hearing.

Very truly yours,

Robert N. Kharasch

Attorney for  
Philip R. Consolo

cc. All counsel  
bcc. Philip R. Consolo

## BEFORE THE FEDERAL MARITIME BOARD

HERMAN GOLDMAN  
Attorney & Counselor at Law  
Equitable Building  
120 Broadway  
New York 5, N.Y.

April 7, 1959

James L. Pimper, Esq.  
Secretary  
Federal Maritime Board  
Washington 25, D.C.

Re: Dockets 827, 835, 841

Dear Mr. Pimper:

I refer to the letter of April 2, 1959 addressed to you by Mr. Kharasch regarding the notice fixing the date for oral argument to the Board and requesting that the date of such argument be advanced.

I would suppose that the date fixed by the Board for such argument was the earliest date which suited the convenience of the Board with due regard for the other business which the Board has before it. Implicit in Mr. Kharasch's request is the suggestion that other matters be deferred and that his client be preferred—such preference to be afforded because Consolo's complaint was "diligently prosecuted" before the Board and Panama Ecuador's "participation in the case has been characterized by repeated attempts at delays".

I would not trouble to address this letter to the Board were it not for the fact that it has become impossible further [fol. 253] to suffer uncomplainingly the unjust insinuations which Consolo's counsel now spread on the record for a fourth time—such insinuations have already been contained in their brief to the Examiner, their main brief to the Board, and in their reply to Panama Ecuador's exceptions. The time has come to set the record straight.



A—As to the “diligent prosecution” of Consolo’s complaint:

1) I know of no action taken by Consolo’s counsel to expedite the hearings in these dockets, and I believe that the record will demonstrate that such counsel did nothing other than to proceed with the matter in the regular, normal course which like matters pursue before the Board. If this be the “diligent prosecution” of which Mr. Kharasch speaks it should not serve to obtain for him or his client a preferred position.

2) I believe that Consolo or his counsel delayed the proceedings on the common carriage issue. The record will disclose that it was at the insistence of Consolo’s counsel that the issue of reparation was tried first. Session after session before the Examiner was consumed in putting in the proof of Consolo’s alleged damages, and it was only on the motion of Banana Distributors that an end was finally put to that time consuming procedure and the hearings turned in the direction of the issue of common carriage, the sole issue before the Board.

3) “Diligent prosecution” would, I believe, comprehend compliance with the Board’s rules. Such rules require that copies of briefs be dispatched to other counsel in such good time as to permit of their receipt by such other counsel on the date the brief is due to be filed with the Board. Consolo’s counsel has consistently ignored this requirement. Copies of their brief to the Examiner and their principal brief to the Board were first mailed to other counsel on the filing date. Their reply to the exceptions of Panama Ecuador and Flota Grancolombiana was due on March 21. In fact it was not served on the Board until March 23 on which date copies were first mailed to other counsel. I do not write of this failure of Consolo’s counsel to comply with the Board’s rules as a suggestion that such briefs be not considered but only to point out that Mr. Kharasch’s assertion of “diligent prosecution” is one to which he would have difficulty in gaining adherents.

[fol. 254] B—As to the “attempts at delays” by Panama Ecuador:

1) The record will demonstrate that Panama Ecuador's witnesses were available when required and testified without prolixity. The record will also disclose that the time consumed in cross examining Panama Ecuador's principal witness probably exceeded by far the time consumed in his direct examination.

2) Mr. Kharasch's letter fails to particularize the "repeated attempts at delays". I assume they refer to (a) the refusal to waive briefs to the Examiner and (b) the application for a brief extension of time within which to file exceptions to the Examiner's recommended decision. Suffice it to say that in both instances the Examiner upheld Panama Ecuador's position. Perhaps the best proof of the fact that Consolo's counsel required the time allowed by the Examiner consists of the fact that they utilized every minute of the allotted time—even, as heretofore observed, at the expense of compliance with the rules.

Lastly, I would point out only that Mr. Kharasch's suggestion that only "a relatively brief and simple oral argument is required" does not square too readily with his request for 1½ hours time for oral argument. I note also that he has studiously avoided mention of the fact that the reversal by the Court of Appeals of the Board's decision in the Banana Distributors case casts a new complexion on the whole matter and makes it one of considerable complexity.

Very truly yours,

cc All parties

[fol. 255] Service (omitted in printing).

BEFORE THE FEDERAL MARITIME BOARD  
Docket No. 827 (Sub. No. 1)

PHILIP R. CONSOLO, Complainant,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Respondent.

SUPPLEMENTAL COMPLAINT—Received November 18, 1959

Complainant alleges upon information and belief:

1. The allegations of paragraphs 1 through 10 of the original complaint in Docket 827 (copy attached hereto and marked Appendix A) are repeated and incorporated herein.

\* \* \* \* \*

Wherefore, complainant requests that in addition to the relief requested in his original complaint in Docket 827, an order be issued by the Board (a) ordering Grancolombiana to pay reparation to complainant for his damages during the period November 15, 1957, through September 1, 1959, in the amount of \$250,000 and (b) awarding such other and further relief as the Board may determine to be just and reasonable.

Philip R. Consolo, 4425 North Michigan Avenue,  
Miami Beach, Florida, By: Robert N. Kharasch,  
Attorney.

\* \* \* \* \*

[File endorsement omitted]

[fol. 256]

## BEFORE THE FEDERAL MARITIME BOARD

BRIEF OF FLOTA MERCANTE GRANCOLOMBIANA, S.A.—  
July 7, 1960

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[fol. 259]

BEFORE THE FEDERAL MARITIME BOARD

Complainant found injured to the extent of \$259,812.26 by respondent's refusal to allocate to him refrigerated space on respondent's vessels for the carriage of bananas from Ecuador to North Atlantic ports of the United States, and reparation in that amount should be awarded, with interest.

*Robert N. Kharasch and William J. Lippman* for complainant.

*Renato C. Giallorenzi and John H. Dougherty* for respondent.

RECOMMENDED DECISION OF C. W. ROBINSON, EXAMINER,  
ON REPARATION—October 5, 1960

In *Philip R. Consolo, et al. v. Flota Mercante Gran-colombiana*, 5 F.M.B. 633 (1959),<sup>1</sup> the Board found, among other things, that respondent (Flota) was a common carrier by water between the west coast of South America and North Atlantic and Gulf ports of the United States, and

<sup>1</sup> A consolidation of Docket Nos. 827, 835, and 841.

that its practice of contracting all of its refrigerated space on vessels in those trades to one shipper of bananas to the exclusion of other qualified shippers of bananas, was unjustly discriminatory and unduly and unreasonably prejudicial and disadvantageous, in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916. Nos. 827 and 841 were held open for further action on the claims for reparation, if any. On September 1, 1959, in compliance with the Board's order, Flota executed space contracts with all qualified shippers of bananas.

A supplemental complaint was filed by complainant Consolo (No. 827 (Sub. No. 1)) on November 18, 1959, the allegations of which are generally the same as those in No. 827. The avowed purpose of the supplemental complaint is a "probably unnecessary precaution against the running of the statute of limitations following the date of the first complaint" (footnote 2, page 2, of complainant's opening brief on reparation). Hearing on Consolo's claim [fol. 260] for reparation has been held, and the parties have filed opening and reply briefs.

The Board has found Consolo to be an experienced and qualified banana shipper (5 F.M.B. 635, 638). Although respondent delved into that phase of the matter during the reparation hearing, ~~no serious point is made of it on brief.~~ There is therefore no need for discussion of complainant's ability to finance the shipments upon which his claim for reparation is based. It is undisputed that an ample quantity of good bananas was available to Consolo in Ecuador had he been able to secure space on Flota's vessels. Flota argues that Consolo should have tendered bananas when he applied for space, but with a commodity as perishable as bananas, their tender would not have been a very smart move on Consolo's part, and certainly he was not required to perform such a "futile and idle act." *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293, 303 (1953). Tender was not required in *Hernandez v. Bernstein*, 116 F.2d 849, 852 (2d Cir. 1941).

In assessing the possibility of sales of bananas which Consolo might have imported on Flota's vessels had he been permitted to ship, it should be borne in mind that the volume

would not have been in addition to the quantity actually handled by Flota since it would have been stowed in space which other shippers were occupying. Intervener Panama Ecuador Shipping Corporation (Panama Ecuador), which had *all* the space but gave it up subsequent to the Board's decision on the merits, now charters entire vessels and imports 31,000 more stems of bananas each week than it did when shipping via Flota and via Grace Line, Inc.

The bananas Consolo would have had on the Flota vessels would have been sold at the prevailing market prices at the principal North Atlantic ports. The prices were substantially the same at all of those ports. Wholesalers and jobbers of bananas require a continuing supply of fresh fruit because of the perishable nature of the commodity, hence the more vessel arrivals there are the better opportunity the importer has to market his fruit at favorable prices.

[fol. 261] The sale of bananas on the wholesale level is highly competitive, and purchasers generally are not tied by contract or otherwise to a particular importer. The record is clear, and it is so found, that Consolo could have sold all the bananas he would have been able to import on Flota's vessels had he been able to secure space.

It having been found that Consolo was an experienced and qualified shipper of bananas, that he was denied space unlawfully on Flota's vessels, that an adequate supply of good-quality bananas was available to him in Ecuador during the times under consideration, that he was financially able to purchase the fruit, and that he could have sold the fruit at market prices had he been able to utilize Flota's vessels, the remaining issue is the amount of reparation to which he is entitled, if any.

Generally, the measure of damages for failure of a common carrier to accept a shipment is the difference between the value of the commodity at the place it would have been tendered and its value at destination, less the cost of transportation. *McLean v. Denver & Rio Grande R.R. Co.*, 203 U.S. 38, 49 (1906); *Sonken-Gulamba Corp. v. A.T. & S.F.*, 124 F.(2d) 952, 958 (8th Cir. 1942). Flota contends, however, that Consolo could have minimized his damages by



utilizing other available transportation, three possibilities being suggested: (1) Grace Line, (2) Chilean Line, and (3) charter of vessels.

(a) During the period under consideration there was no additional space available to Consolo on the Grace ships, and even when some of the Grace shippers relinquished their space in 1958 Consolo was unable to obtain any of it.

(b) In September 1955, when the hearings commenced in *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957) and 5 F.M.B. 615 (1959), Chilean Line was not a satisfactory carrier of bananas because of its irregular service and transit time. The service had improved to such an extent in 1958, however, that Consolo booked the entire available refrigerated space for five consecutive voyages. During this period Consolo requested space for an additional 18 or 24 months but was refused. After Chilean Line had circularized the trade in 1959 for prospective shippers, [fol 262] replies were received from Consolo and one Chilean company, the latter eventually receiving the space. Even as late as May 1960 (the time of the present reparation hearing) Chilean Line did not furnish a weekly service such as is furnished by Grace Line and Flota. Furthermore, Chilean Line generally carries no bananas during the Chilean fruit season (December-May).

(c) Although Consolo was required to use reasonable efforts to minimize his damages, this does not mean that he should have chartered entire refrigerated vessels. It ill-behooves a common carrier, which has failed in its duty to perform for the public in general, to insist on such extreme counter measures by a shipper deprived of space.

Consolo's first attempt to secure space on Flota's vessels was late in 1954. Further discussions were had in the spring of 1955, at which time Consolo inspected the space on one vessel. A fixed price for the space was set by Flota, but since Consolo was not satisfied with the physical characteristics of the facilities, he made a counter offer, which was rejected. In July 1955 the space was leased to the organizers of intervener Panama Ecuador. Consolo again

inquired about space possibly late in 1955 and also in 1956, but was told that all of it was under contract. By letter of February 26, 1957, Flota advised Consolo to submit any bid to the home office in Ecuador. This was done by letter of March 6, 1957, directed to the entire space on five vessels. By letter of June 21, 1957, Consolo was informed that the space had been given to another firm (Panama Ecuador interests). In the meantime, on April 29, 1957, the Board had found that Grace Line was a common carrier of bananas from Ecuador to the Atlantic coast of the United States, and that its refrigerated space should be pro-rated among qualified shippers of bananas (the Board's order was dated August 19, 1957). *Banana Distributors, Inc. v. Grace Line, Inc., supra*. As the result of this action by the Board, Consolo wrote to Flota on August 23, 1957, and stated that "before issuing any allotment of space on your ships, I wish to be considered for a fair and reasonable amount since I have consistently been asking for space on your ships for the past two years." Flota informed Consolo by letter of [fol. 263] October 7, 1957, that all refrigerated space on its vessels had been committed for the following two years, but that it would be pleased, at the end of that time, to consider Consolo's application for an allotment.

It is apparent that Consolo was interested primarily in the entire space on the Flota vessels until after the *Banana Distributors* decision, even though the Board had passed favorably on his earlier claim against Grace Line for the same general relief (*Philip R. Consolo v. Grace Line*, 4 F.M.B. 292 (1953)), and that in his negotiations with Flota he did not take into consideration the interests of other banana shippers until his demand of August 23, 1957. Flota's status as a common carrier of bananas did not squarely arise until Consolo's demand of August 23, 1957 (and that of *Banana Distributors* in the same month, *infra*), hence any reparation to which Consolo is entitled must have its genesis as of that date.

Consolo predicates his damages on the use of  $\frac{1}{3}$  of the space that could have been made available to him. Flota, on the other hand, contends that only 18.46 percent of the space would have been made available to Consolo. It there-

fore becomes necessary to determine (1) how many shippers either did ship or could have shipped bananas via Flota from August 23, 1957, to September 1, 1959, when all qualified shippers were given space, and (2) the portion of the total space each would or could have utilized during that period.

In addition to Consolo, another shipper ("Noboa", for short), admitted by Consolo to be experienced in the banana business, also submitted a bid for space in February 1957. Furthermore, the contract with Panama Ecuador was renewed for three years on July 19, 1957. On August 6, 1957, the attorney for intervener Banana Distributors wrote to Flota and requested 50,000 cubic feet of refrigerated space on each Flota vessel (approximately the full capacity) for an unnamed client. Banana Distributors itself wrote to Flota on August 26, 1957, and requested "immediate allocation to this firm of a proportionate amount of your refrigerated space." Both requests were rejected. Between June and November 1957, applications for space were filed by seven other persons or firms, but Flota made no investigation as to their financial qualifications. Under the circumstances, these seven applicants should not be here considered. Thus, on August 23, 1957, Consolo, Panama Ecuador, Banana Distributors, and Noboa were the only actual or potential shippers of bananas on Flota's vessels. Panama Ecuador's witness testified, however, that his company would not have accepted less than all of the space, a position confirmed when the company did not seek an allocation of space when Flota complied with the Board's order on September 1, 1959. This means, then, that only three persons or firms might have shipped between August 23, 1957, and September 1, 1959 (Consolo, Banana Distributors, Noboa). When Flota opened the space to qualified shippers it was found that only five were acceptable. As it finally shaped up, Consolo received 18.46 percent of the total space; this figure, referred to earlier herein, is the maximum proportion of space against which Flota believes *any* computation of reparation to Consolo should be made.

As his original complaint was filed on November 15, 1957, Consolo maintains as a matter of principle that from that time until September 1, 1959, he was entitled to half of the space, the other half to be credited to Banana Distributors. He is content, however, that a  $\frac{1}{3}$  division is "appropriate" (Consolo's opening brief, pages 21-22). There is no evidence of sound probative value as to how the space would have been divided among Consolo, Banana Distributors, and Noboa had all three shipped during the period, hence it is concluded that an equitable proration would have been  $\frac{1}{3}$  to each of the three. Although the conclusion here reached naturally is subject to some objection by the very nature of the situation, a certain amount of latitude must be allowed, and any doubt should be resolved in Consolo's favor. The law is satisfied with a practical solution. Of general help in that respect are *Power Comm'n v. Hope Gas Co.*, 321 U.S. 591 (1944); *Power Comm'n v. Pipeline Co.*, 315 U.S. 575 (1942); *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *Morrisdale Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 304 (1913).

In computing his damages, Consolo uses the loading, outturn, and liquidation sheets<sup>2</sup> for each shipment of bananas made by him on Grace Line vessels during the rep-[fol.265] aration period, and applies them against the space that would have been used on Flota's vessels at Flota's freight rates during the same period (Flota supplied its freight charges, stevedoring costs, and numbers of stems carried). This method of ascertaining damages is logical and fair under the particular situation here present. It is concluded and found that Consolo's damages are as shown in the following table.

Period	Voyages	Stems	Net profit <sup>1</sup>	1/3 net profit
8/23/57-9/1/59	105	1,133,927	\$779,436.78	\$259,812.26

<sup>1</sup> After deducting freight, stevedoring, overhead, and miscellaneous expenses.

In addition to the sum of \$259,812.26, Consolo is entitled to interest at six percent from the date of arrival of each vessel from which he was shut out.

<sup>2</sup> Report of commission merchant rendered to importer, showing proceeds of sale, certain expenses, commission fee, and net proceeds.

### Recommendation

The Board should find that Consolo is entitled to reparation in the amount of \$259,812.26, plus interest at six percent from the date of arrival of each vessel from which he was shut out.

C. W. Robinson, Presiding Examiner.

October 5, 1960

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[fcl. 267]

### BEFORE THE FEDERAL MARITIME BOARD

\* \* \* \* \*

EXCEPTIONS OF RESPONDENT FLOTA MERCANTE GRANCOLOMBIANA, S. A. AND BRIEF IN SUPPORT OF EXCEPTIONS—  
December 2, 1960

\* \* \* \* \*

For the reasons stated in the following brief, Flota Mercante Grancolombiana, S. A. ("Flota"), respondent in the above proceeding, hereby excepts to the Examiner's Recommended Decision on reparations served on October 6, 1960.

### Exceptions

Flota excepts to:

1. The Examiner's ultimate recommendation that "Consolo is entitled to reparation in the amount of \$259,812.26 plus interest at six percent from the date of arrival of each vessel from which he was shut out."
2. The Examiner's failure to recognize that the Board's decision of June 22, 1959 did not purport to determine liability for the period prior thereto.
3. The incompleteness of the Examiner's findings as to the facts and circumstances confronting Flota prior to and during the period for which reparations are sought, and to his failure to consider and make complete findings thereon, as contained in Flota's opening brief on repara-

tions, dated July 7, 1960, and in Part III of the brief following these exceptions; and his failure to find that in light of such circumstances Flota's actions were completely reasonable and violated no provisions of the Shipping Act, and no obligation to Consolo.

4. The Examiner's failure to find that in any event award of reparations would be inequitable and unjust, and for that reason should be denied.

5. The Examiner's inclusion of voyages subsequent to the Board's report of June 22, 1959, in calculating reparations, and to his failure to find that Flota acted promptly [fol. 268] thereafter to comply with the Board's order, and therefore incurred no liability during that period.

6. The Examiner's failure to find that the burden of proof upon all issues was upon Consolo, including the alleged violation prior to compliance with the Board's order of June 22, 1959; the alleged injury to Consolo during the period; and the extent of any such injury; and to his failure to impose that burden on Consolo.

7. The Examiner's failure to find that the record proves there was no injury to Consolo and that Consolo's claim of injury is not bona fide.

8. The Examiner's failure to find that Consolo's claimed losses are speculative.

9. The application by the Examiner of an incorrect measure of damages.

10. The Examiner's incorrect computation of reparations, including his arbitrary allocation to Consolo of one third of Flota's space, for calculation purposes; his failure to appreciate the significance of the 18.46 percent figure representing the allocation to Consolo following the Board's order of June 22, 1959; and other errors set forth in the supporting brief.

11. The Examiner's failure to hold Consolo is not the proper party complainant.

12. The Examiner's conclusion that Consolo could not have minimized his damages, if any, by utilizing other available transportation, including specifically Grace Line, Chilean Line, and chartered vessels.

13. The recommended award of interest on reparations.

14. The Examiner's subsidiary findings, or the possible implications therefrom, inconsistent with the foregoing exceptions, including, without limitation, the following:

(a) that Consolo is an experienced and qualified banana shipper, and that there is no need to consider his ability to finance shipment on which reparations are claimed (Rec. Dec., page 2);

[fol. 269] (b) that "it is undisputed that an ample quantity of good bananas was available to Consolo in Ecuador had he been able to secure space on Flota's vessels" (Rec. Dec., page 2);

(c) that Consolo was not required to make a tender in excess of his various letters requesting space (Rec. Dec., page 2);

(d) that the bananas Consolo claims he would have shipped on Flota's vessels would not have increased the volume of bananas delivered to the United States (Rec. Dec., page 2);

(e) that such hypothetical bananas would have been sold at the market prices which in fact prevailed during the reparations period (Rec. Dec., page 3);

(f) that the prices received by all importers at North Atlantic ports were the same (Rec. Dec., page 3);

(g) that the greater the supply of bananas, the better the price received (Rec. Dec., page 7);

(h) that Consolo could have sold all the bananas he would have been able to import via Flota;

(i) the findings beginning at the bottom of Rec. Dec., page 2, and continuing through the middle of page 3, desig-



nated "(a)", "(b)", and "(c)", dealing with mitigation of damages;

(j) that Flota acquired the status of a common carrier, and that this occurred on August 23, 1957 (Rec. Dec., page 5);

(k) to findings and conclusion that only three shippers should be considered in allocating Flota's space for reparations computation (Rec. Dec., pages 5-6).

15. The Examiner's failure to find that the renewal of Panama Ecuador's contract in 1957 was based upon an option contained in the 1955 contract between Flota and Panama Ecuador, and upon Flota's action determining that Panama Ecuador's bid was the most favorable to it, all of which occurred prior to the Board's decision in the *Banana Distributors* case;

16. The Examiner's failure to find that there was no significant competition between Consolo and Panama Ecuador;

[fol. 270] 17. The method of ascertaining damages employed by the Examiner (Rec. Dec., page 7);

18. The Examiner's failure to make subsidiary findings as to the components of the recommended \$259,812.26 reparations;

19. The Examiner's failure to enter findings in accordance with the facts recited by Flota at pages 5-44 of its opening brief on reparations dated July 7, 1960.

\* \* \* \* \*

#### BEFORE THE FEDERAL MARITIME BOARD

REPORT OF THE BOARD—Submitted January 25, 1961 and  
decided March 28, 1961

Thomas E. Stakem, Chairman; Sigfrid B. Unander, Vice  
Chairman; Ralph E. Wilson, Member.

By the Board.



## I. Proceedings

By an order on June 22, 1959 the Board ordered that the proceeding docketed as No. 827 be held open for further proceedings on the claim of complainant, Philip R. Consolo (Consolo), for reparations, if any, (5 F.M.B. 633, 641) pursuant to Sec. 22 of the Shipping Act, 1916, as amended, (Act). The present proceedings are in response to a complaint to Docket No. 827 filed November 15, 1957 by Consolo requesting an order by the Board ordering Flota Mercante Grancolombiana, S.A. (Flota) to pay reparation for damages during the period November 4, 1955 through November 4, 1957 in the amount of \$600,000 and other relief and to a supplemental complaint filed November 18, 1959 (Docket No. 827, sub. No. 1) by Consolo requesting an order by the Board ordering Flota to pay reparation for damages during the period November 15, 1957 through September 1, 1959, in the sum of \$250,000 and for other relief.

By its report and order of June 22, 1959, served July 2, 1959, in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633 (1959) the Board found Flota to be a common carrier by water in the operation of ships between the west coast ports of South America and United States Atlantic ports and found Flota's practice [fol. 271] of contracting all of its refrigerated space on its ships operating between Ecuador and ports on the North Atlantic coast of the United States to a single shipper to be unjustly discriminatory and unreasonably prejudicial in violation of the Act.

The further proceedings and hearing on the claim for reparations were had by an examiner who, on October 5, 1960, submitted a recommended decision that reparations were due in the amount of \$259,812.26. Exceptions and replies thereto were filed. Oral argument before the Board was held on January 25, 1961.

## II. Facts

Consolo, an experienced and qualified shipper of bananas for many years between Ecuador and the United States

was found to have proven his complaint that Flota's practice of excluding him was in violation of Secs. 14 and 16 of the Act. The Board's findings of fact, conclusions, decision and order on this phase of the proceedings were entered of record and reported in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana, S.A.* (Supra).

In its report the Board found that Flota in the operation of its freight ships between Ecuador and the U.S. North Atlantic ports and U.S. Gulf of Mexico ports is a common carrier by water in the foreign commerce of the U.S. (page 638). No date was established for the beginning of such status, but Flota was shown to have operated since July 20, 1955 between Ecuador and the U.S. on an approximately weekly schedule with 5 ships and that it now operates 6 ships. Consolo did not use any of these ships until September 1, 1959.

Consolo first expressed an interest in space in the Spring of 1955 when he had a conference with Flota officers and "made inquiry as to the height of each chamber [for banana storage] and then the rate they were asking for the ships". He inspected a ship later and found fault with the height of the storage chamber. Consolo was given figures as to what Flota "wanted for the ships in its entirety" (sic) but he asked for a reduced rate on the lower chamber or for the two upper chambers at the proposed rates. The counter offers were rejected. Other negotiations, for a contract by [fol. 272] correspondence and by conversations in 1956 and 1957, did not result in a mutually acceptable arrangement. At no time before August 23, 1957 did Consolo ask for an allotment of space at a regular tariff rate, but accepted the prevalent trade custom of either bidding or negotiating for space on a contractual basis.

Consolo proved that he could have bought and sold 5,000 to 15,000 additional stems of bananas if Flota had allotted him space.

By a letter dated August 23, 1957 addressed to Flota at Bogota, Colombia, Consolo wrote asking "to be considered for a fair and reasonable amount" of space on Flota's ships. The letter referred to our dockets Nos. 771 and 775 as the

basis for this request. Flota's reply dated October 7, 1957 was that "reefer space on our vessels has been committed for the next two years".

By its order of June 22, 1959, served July 2, 1959 the Board ordered Flota to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or understandings for the carriage of bananas, found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916 as amended, not later than August 1, 1959". Respondent was also ordered to offer, within 10 days after July 2, 1959, all qualified banana shippers refrigerated space for the carriage of bananas. No proofs were introduced in the present proceeding to show how this order was complied with. An allotment of space was made by Flota September 1, 1959 when Consolo was one of five qualified shippers who applied for and were allotted space.

### III. Discussion

Sec. 22 of the Act authorizes any person to file a sworn complaint "asking reparation for the injury, if any," caused by any violation of the Act. Exclusion of complainant, Consolo, from the use of Flota's common carrier service from Ecuador has been found to be a violation of the Act. Consolo filed a sworn complaint asking for reparations. An examiner conducted proceedings in which the issues were limited to ascertaining the period of injury and the computation of the amount due as damages for injury. The examiner recommended that complainant is entitled to reparation in the amount of \$259,812.56 based on 105 voyages during the period August 23, 1957 to September 1, 1959, yielding a net profit of \$779,436.78 of which Consolo was entitled to one-third.

In interpreting Sec. 22 in *R. Hernandez v. A. Bernstein Schiffahrtgesellschaft*, 1 U.S.M.C. 686 (1937) the U.S. Maritime Commission held that defendants unjustly discriminated against complainant in violation of paragraph Fourth of Sec. 14 of the Act by refusing to book cargo in response to applications by complainants for the trans-

portation of automobiles. Complainant was shown to have exported unboxed automobiles by securing steamship booking and then purchasing the automobiles therefor. Complainant was also shown to have the ability to obtain automobiles for shipment. In some cases complainant also had small lots of automobiles available in New York ready to ship to Bilbao, Spain before booking. Defendants were shown to have held themselves out as common carriers of unboxed automobiles from New York to Bilbao. Their ships were constructed to accommodate automobiles and capacity was available. The number of automobiles required to fulfill complainant's contract to sell to a dealer in Spain was shown. Complainant proved a loss of 15% profit on prospective shipments. Proximate injury was held to have been caused complainant because of his inability to supply automobiles pursuant to an agreement with the importer in Spain. The case was assigned further hearing to determine the amount of reparations due, in the absence of evidence (1) that all the cars upon which reparation was based could have been carried by defendants, (2) as to the amount of space which was available and, (3) as to the value of the cars which could have been carried in such available space.

In *Roberto Hernandez, Inc. v. Arnold Bernstein S., M.B.H.*, 2 U.S.M.C. 62 (1939) the above elements were proven and reparations equal to the estimated net profits that would have been earned during the reparations period were established.

The defendants having failed to comply with the order, the appellant brought suit for enforcement pursuant to Sec. 30 of the Act. The defendants resisted enforcement on the ground that (1) there was no basis for the plaintiff's [fol. 274] claim and (2), it was plaintiff's duty to mitigate any damages. The District Court agreed in *Roberto Hernandez, Inc. v. Arnold Bernstein S., M.B.H.*, 31 F.Supp. 76 (D.C.N.Y. 1940), but on appeal Circuit Court, reversed in 116 F.2d 849 (C.C.A. 2d, 1941) stating that the District Court raised too high a standard on which to test the proof as to damages as found by the Commission. The Court

held that where the Commission's findings "are supported by substantial evidence . . . and where no new evidence on the subject is introduced . . . it is the duty of the court to accept and give them effect". The duty of the court is equally that of the Board. The basis for plaintiff's claim was found to exist and the Court stated that "burden to show a failure to mitigate the damages was upon the defendants".

In the reparation hearing in *Waterman v. Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248 (1950), the Board found that the complainants had not sustained the burden of proof because of want of proof on "cost, outturn and selling price" but in so holding acknowledged that damages are to be based on the difference between cost and selling price, where there was a refusal to furnish refrigerated space to the complaining fruit shippers.

The Supreme Court has held that ordinarily "the measure of damages in such case [refusal to carry] is the difference between the value of the goods at the point of tender and their value at the proposed destination, less the cost of carriage." *New Mexico ex rel. McLean & Co. v. Denver & R.G.R. Co.*, 203 U.S. 38, 27 S.Ct. 1, 3 (1906). In accord are 9 Am. Jur. Carriers, §314, 3 Hutchinson on Carriers (3rd Ed.) §§1359, 1370, 2 Moore on Carriers §609, 13 C.J.S. Carriers, §33, and see *Sonken-Galamba Corp. v. Atchison, T. & S.F. Ry. Co.*, 124 F.2d 952, 958 (C.C.A. 8th, 1942).

In the present case proof of damages meeting the specific standards of cost, outturn and selling price was offered in detail. Witnesses were agreed on the availability of bananas in Ecuador and the existence of a market for them in the United States. Consolo was shown to have the resources to buy and ship bananas. The loading sheets showing actual purchases and the outturn sheets showing actual [fol. 275] sales and "liquidation sheets" (report of commission merchant to importer showing proceeds of sale, expenses, commission and net proceeds) were used, for each shipment of bananas by Consolo on Grace Line ships during the reparation period. The space that would have been used

on Flota ships at Flota's freight rates during the reparation period was shown. Costs in Ecuador were taken from actual loading sheets showing actual purchases week-by-week. Freight charges were supplied from Flota's records of actual freight collected on its voyages during the reparation period. Stevedoring costs came from testimony of banana shippers as to actual cost at New York. We find the figures used in the reparation computation to be fully supported in the record. The computation itself, using the above data, established a dollar figure for profit or loss per banana stem shipped before stevedoring and freight. From the amount of profit per voyage the freight stevedoring and incidental administrative overhead and other expenses have been deducted. The examiner's conclusions were based on these fully documented facts.

Consolo excepted to the examiner's recommendation that the reparation period did not begin until August 23, 1957 and to the failure to recommend that Consolo be awarded reparation for the period November 15, 1955 through September 1959 inclusive. Consolo also excepted to an error in computing damages within the period August 23, 1957 to September 1, 1959 on the ground that the deduction from profit for stevedoring costs should be the cost for stevedoring in Philadelphia instead of New York. The New York costs were shown to be 48.8 cents per stem whereas the actual Philadelphia costs were later shown to be 35.15 cents per stem.

Flota excepted to the following:

1. The Examiner's ultimate recommendation.
2. The Examiner's failure to recognize that the Board's decision of June 22, 1959 did not purport to determine liability for the period prior thereto.
3. The incompleteness of the Examiner's findings as to the facts and circumstances confronting Flota prior to and [fol. 276] during the period for which reparations are sought, and to his failure to consider and make complete findings thereon, as contained in Flota's opening brief on

reparations, and in the present brief; and his failure to find that in light of such circumstances Flota's actions were completely reasonable and violated no provision of the Act, and no obligation to Consolo.

4. The Examiner's failure to find that in any event award of reparations would be inequitable and unjust, and for that reason should be denied.

5. The Examiner's inclusion of voyages subsequent to the Board's report of June 22, 1959, in calculating reparations, and to his failure to find that Flota acted promptly thereafter to comply with the Board's order, and therefore incurred no liability during that period.

6. The Examiner's failure to find that the burden of proof upon all issues was upon Consolo, including the alleged violation prior to compliance with the Board's order of June 22, 1959; the alleged injury to Consolo during the period; and the extent of any such injury; and to his failure to impose that burden on Consolo.

7. The Examiner's failure to find that the record proves there was no injury to Consolo and that Consolo's claim of injury is not bona fide.

8. The Examiner's failure to find that Consolo's claimed losses are speculative.

9. The application by the Examiner of an incorrect measure of damages.

10. The Examiner's incorrect computation of reparations, including his arbitrary allocation to Consolo of one third of Flota's space, for calculation purposes; his failure to appreciate the significance of the 18.46 percent figure representing the allocation to Consolo following the Board's order of June 22, 1959.

11. The Examiner's failure to hold Consolo is not the proper party complainant.

12. The Examiner's conclusion that Consolo could not have minimized his damages, if any, by utilizing other avail-



able transportation, including specifically Grace Line, Chilean Line, and chartered vessels.

[fol. 277] 13. The recommended award of interest on reparations.

14. The Examiner's subsidiary findings, or the possible implications therefrom, inconsistent with the foregoing exceptions, listing certain findings of fact.

15. The Examiner's failure to find that the renewal of Panama Ecuador's (Panama-Ecuador Shipping Corporation, exclusive shipper on Flota's ships) contract in 1957 was based upon an option contained in the 1955 contract between Flota and Panama Ecuador, and upon Flota's action determining that Panama Ecuador's bid was the most favorable to it, all of which occurred prior to the Board's decision in the *Banana Distributors* case; (*Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957)).

16. The Examiner's failure to find that there was no significant competition between Consolo and Panama Ecuador.

17. The method of ascertaining damages employed by the Examiner.

18. The Examiner's failure to make subsidiary findings as to the components of the recommended \$259,812.26 reparations.

19. The Examiner's failure to enter findings in accordance with the facts recited by Flota in its opening brief on reparations.

The arguments supporting the exceptions are essentially (1) that the Board did not, in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana* (supra), find Flota guilty of violating the Act before June 22, 1959; (2) that in contracting all of its refrigerated space for bananas to a single shipper before then Flota acted legally, (3) that the failure of the Board or the Board's staff, prior to June 22, 1959, to give Flota a legal opinion, in response to a petition for de-



claratory relief, as to the validity of Flota's exclusive patronage contract prevents the Board from considering Flota as having acted wrongfully; (4) that the complaint and request for the losses are speculative, the claim for reparation is not bona fide, and the burden of proving loss has not been sustained; and, (5) the damages were incorrectly measured and computed and interest should not be added.

For the reasons given below, we agree in part only with the respondent's exceptions as to the computation of reparations and to the award of interest on reparations. The remaining exceptions are rejected. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified.

The 1st and 13th exceptions refer to the award of interest on reparations. We find that it would be inequitable to award interest on an unliquidated claim before it was due and disallow any interest on the award herein.

In exception 2 respondent argues that it acted reasonably and did not unjustly, unfairly or unreasonably discriminate against Consolo and therefore did not violate any statute during the period before the Board's order of June 22, 1959. In exception 3 the incompleteness of the findings is averred and in exception 4 failure to find inequity in an award is excepted to. Our report in 5 F.M.B. 633 has already held that in the past "Flota has acted in violation of Sec. 14, Fourth and 16 of the Act." (639). The facts and circumstances omitted all relate to more arguments that Flota did not violate the Act before June 22, 1959. Such facts and the issues they raise have already been considered and decided in the first proceeding and are not appropriate subjects for exceptions in the reparations phase of this docket. The examiner properly did not review these facts nor retry the issues they raise. The previous report on these issues is plain and is final as far as the Board is concerned. The only remaining issue was the measure of the reparation Consolo is entitled to under Sec. 22 of the Act. Facts bearing on this issue alone were all the examiner was required to consider.

The exceptions are also based on the argument that because Flota had contracted all of its space to another single shipper during the period involved reparations would be inequitable and unjust and the inclusion of voyages before June 22, 1959, when the favored shipper's contract was still being performed, was not proper. This argument, too, uses the erroneous premise that performance of the exclusive patronage contract, during a time when Flota unjustly discriminated against a shipper in the matter of cargo space and gave undue and unreasonable preference or advantage to particular persons, was a valid excuse for non-[fol. 279] performance of obligations under Secs. 14 and 16 of the Act. The performance of the contract is the very act which constitutes the violation of such sections. We have held that such conduct was improper in the following words: "It is . . . clear that they (Consolo and Banana Distributors, Inc.) were denied reefer space accommodations by Flota, to their prejudice and disadvantage, and that Panama Ecuador, in receiving and using that space, was favored and advantaged. We find no justification for this conduct on the part of Flota and conclude that in denying reefer space to complainants, and in granting that space to a single favored shipper, Flota has acted in violation of Secs. 14, Fourth and 16 of the Act." *Philip R. Consolo et al. v. Flota Mercante Grancolombiana*, (supra at p. 638). In other words, as long as the contract caused the denial of space there was a violation. The violation did not begin June 22, 1959, but long before this. There can be no question of inequity or unjustness to a respondent who violates the Act by means of an exclusionary contract. It is the excluded shipper who has the equities on his side under the Act, not the favored shipper nor the discriminatory and preference-giving carrier.

One of the arguments advanced to prove absence of fault in failing to offer non-discriminatory and non-preferential service was (1) that Flota had filed a petition for declaratory relief (Docket No. 835, decided in *Philip R. Consolo et al. v. Flota Mercante Grancolombiana*, 5 F.M.B. 633 (1959)) asking the Board to determine the validity of Flota's con-

tracts and to terminate the uncertainty that had arisen as a result of the conflicting demands upon Flota following the decision in *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 and 5 F.M.B. 615 (1959) and, (2) that the Board failed to make a timely response thereto. It was not incumbent on the Board, however, to give Flota a legal opinion on the effect of its conduct on shippers. The demands were conflicting only to the extent that Flota made them so by continuing to serve favored shippers. The subsequent uncertainty was the consequence of Flota's own position that it could continue to contract refrigerated space to preferred shippers and to exclude complainants without violating the Act as was contended in *Grace Line v. Federal Maritime Board*, 280 F. 2d 790 (C.C.A. 2d 1960). In *Philip R. Consolo [fol. 280] v. Grace Line, Inc.*, 4 F.M.B. 293 (1953) and *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 278 (1957) the Board decided that Grace Line, Inc. was a common carrier by water under sufficiently similar facts as to lead the Board to state in the present case (5 F.M.B. 633) that what we said in the *Banana Distributors* case "is appropriate here, and we feel is dispositive of the issues in this proceeding". Instead of accepting the *Grace Line* cases as providing a rule for its guidance, Flota refused to offer service and litigated the issues relying on "arguments relating to the differences between Flota's vessels and Grace's vessels" (635) to justify such refusal. Flota was eventually found to have violated Secs. 14, Fourth, and 16 of the Act. No delay converted its past violations into lawful conduct and Flota must take the consequences of its refusal, (it became a common carrier in 1955) to take Consolo's cargo after Consolo asked for non-preferential service in 1957. Common carrier status is not created by nor are violations of the Act non-existent until the Board's report is served. Both are brought about by Flota's own actions beginning in 1955.

The 5th exception relates to the inclusion in the reparations calculations, of voyages after June 22, 1959, which is the date our report in No. 827 was "decided". The examiner extended the damage period to September 1, 1959

when Consolo was actually allotted space in response to the Board's order served on July 2, 1959. Respondents were ordered, within 10 days after the date of service of the order, to offer refrigerated space for the carriage of bananas on its ships to all qualified banana shippers. Flota made no offers between June 22 and July 12, 1959, but we have no reason to doubt that Flota would have offered space on July 12 if bananas had been tendered in Guayaquil at that time. None were tendered before then, as far as this record shows. No shipments were ready until September, but this does not furnish a reason for extending the damage period beyond the date when the Board's order should have been complied with, in the absence of any offer of proof by complainant of a refusal, after July 12, 1959, and in the absence of proof of its own willingness to ship, nor of a tender of cargo. The damage period should not be [fol. 281] extended to the time when the complainant shipper was ready to provide a cargo, but is limited to voyages departing from Guayaquil through July 12, 1959, the date when compliance should have begun. (Cf. *Swift & Company and Swift and Company Packers v. Gulf and South Atlantic Havana SS Conference, et al.*, Docket No. 854 Decided February 2, 1961.

The 6th, 7th and 8th exceptions all concern the proofs of injury offered by complainant and allege a failure to maintain the burden of proof or to show actual damage. The burden of proof was maintained by extensive testimony and exhibits showing availability of bananas, cost, selling price (226 quotations over a period of four years were shown) and freight, stevedoring and other expenses as noted above. The actual damages were shown to be the proximate result of violations of the statute. *Waterman v. Stockholms Rederiaktiebolag Svea et al.*, 3 F.M.B. 248, 249 (1950). The losses shown were not speculative, but fairly inferrible from the data supplied and testimony of witnesses that complainant would have shipped on Flota ships if he had not been excluded.

The 9th, 10th and 17th exceptions deal with the method of measuring and computing the damages. The examiner be-

gan the measure of damages from August 23, 1957 instead of 1955 as claimed. We agree that the examiner's date and with the finding that Consolo's offers and counter-offers for service before then were for contract carriage and not for space on a non-preferential basis. He was not excluded before then because he never sought an allocation of space on an equal basis with other shippers; rather, Flota's facilities or charges for services were not acceptable to the complainant on complainant's terms. These negotiations may not be translated into requests for a non-preferential allocation of space on a common carrier by water. What Flota refused during this period was the demand for a special contract which would make Consolo a favored shipper too.

The examiner found Consolo entitled to one-third of Flota's space based on the fact that complainant was one of three qualified applicants for space. Other applicants were declared to be unqualified. When space was finally allocated five shippers actually qualified and measurement by Flota's technical adviser showed that in actual practice over a period of time there had been an allotment to, and use by, Consolo of 18.46% of the cubic capacity of Flota's ships on the U.S. Atlantic run. This actual experience with Flota appears to be a just and reasonable guide of what Consolo was entitled to for the purpose of measuring his past damages and it is adopted. Respondent's exception on this point is valid.

The 11th exception is found unsupported.

The 12th exception deals with complainant's failure to minimize damages by using other means of transportation. Once the failure to perform common carrier obligations and exclusion is shown, "the burden to show a failure to mitigate the damages was upon the defendants". *Hernandez v. Bernstein*, 116 F. 2d 849 (C.C.A. 2d 1941) at pp. 851, 852. Flota offered no such proof other than a suggestion that chartered ships might be used, but no suitable ones were shown to be available. Respondents have failed to show any mitigating factors.

Exception 14 relates to the examiner's subsidiary findings of fact on which the award of reparations is based. None is shown to be wrong, all have been fully established in this docket.

The 15th exception likewise assumes the untenable premise that discriminatory and preferential conduct did not exist until after the Board's decision on Consolo's complaint against Flota and that the contract which caused such conduct excused the disregard of statutory obligations.

The 16th exception is unsupported by the record.

The 18th and 19th exceptions relate to the ascertainment of damages. Complainant submitted extensive evidence of lost profits in the form of schedules of about 226 individual voyages between 1955 and 1959 showing for each voyage the number of banana stems actually carried by named ships on specified dates between Guayaquil, Ecuador and Philadelphia, Penna. (with the exception of two ships which discharged at Charleston, S.C. and Baltimore, Md. respectively because of a strike at Philadelphia, Penna.). In the absence of other proven data and of any disproof of the complainant's data or challenge of complainant's figures, such data and figures have been used in the computation of reparations found to be due.

[fol. 283] The complainant's profit per stem of bananas is the difference in cost at Guayaquil and the value or sale price at Philadelphia which is taken to be the total gross profit per stem. This amount has been multiplied by the number of stems on each shipment and the products added to get the gross profit. From such total gross profit there has been deducted (1) the total freight cost and (2) the total estimated cost of handling the bananas at Philadelphia. The latter amount is 50.15 cents a stem (35.15¢ for stevedoring, plus 3¢ for overhead, plus 12¢ for insecticides, rope and bags) multiplied by 1,061,286 stems carried during the reparation period. Complainant did not show the 3¢ a stem deduction for overhead in its claim, but this amount was deducted by the examiner with the subse-

quent admission by the complainant that it was a proper amount. The examiner's computation was also based upon the use of New York instead of Philadelphia stevedoring costs and omitted the deduction of the estimated incidental costs of handling bananas at Philadelphia in the amount of 12 cents. The latter figure was also furnished by complainant.

Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959, the use of the complainant's statement of profits per voyage totaling \$2,513,236.43 on all voyages allowed, and the subtraction therefrom of total freight in the amount of \$1,204,343.95 and incidental costs in the amount of \$532,234.93, as proven by complainant, we find the remainder is the proper net profit of \$776,657.55. Consolo is entitled to 18.46% of the net profit. An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of \$143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

By the Board.

Thomas Lisi, Secretary.

[fol. 284]

## BEFORE THE FEDERAL MARITIME BOARD

No. 827

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PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

---

ORDER—March 28, 1961

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered a report stating its findings of fact, conclusions and decisions thereon, which report is hereby referred to and made a part hereof;

It is Ordered, That respondent Flota Mercante Gran-colombiana, S.A. be, and it is hereby notified and directed to pay unto complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, \$143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondent's violation of Secs. 14 and 16 of the Shipping Act, 1916, as amended.

By the Board.

Thomas Lisi, Secretary.



[fol. 285]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
No. 16,369

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FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME BOARD and UNITED STATES  
OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

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Vacated by Order of the Court (August 31, 1961).

Vacating so much of this order as consolidates No. 15,330 with Nos. 16,366 and 16,369.

Before: Wilbur K. Miller, Chief Judge, and Washington and Burger, Circuit Judges.

ORDER—August 11, 1961

This case came on for consideration on intervenor's motion to dismiss or in the alternative to require petitioner to file a bond and said motion was argued by counsel.

Upon consideration whereof it is Ordered by the Court that the aforesaid motion shall be held in abeyance pending hearing of this case on the merits.

It is Further Ordered by the Court, *sua sponte*, that this case and cases No. 15,330, *Flota Mercante Grancolombiana v. United States and Federal Maritime Board* and No. 16,366, *Consolo v. United States and Federal Maritime Board* are consolidated for the purposes of filing respon-

dents' brief, filing a single joint appendix and for argument.

Per Curiam.

Dated: August 11, 1961.

[fol. 288]

BEFORE THE FEDERAL MARITIME BOARD

Transcript of Proceedings—(Excerpts)—November 5, 1958

• • • • •

Hearing Room 818  
45 Broadway  
New York, N.Y.

Hearing in the above-entitled matters was convened, pursuant to notice at 10:00 A.M., before C. W. Robinson, Examiner.

• • • • •

JOSE J. BORRERO having been previously duly sworn, was recalled and was examined and testified further as follows:

Direct examination.

By Mr. Kharasch:

• • • • •

Q. Would you look at this Exhibit 15, please, and tell me, what clause governs the ports at which your ships will discharge bananas in the United States along the United States Atlantic Coast?

A. Here, No. 1, for the transportation of bananas from Guayaquil or Puerto Bolivar or Esmeraldas, Ecuador, South America, to Philadelphia, Pennsylvania, U.S.A.

• • • • •

Q. Mr. Borrero, please direct your attention to Clause 21 again on page 17. Now I asked you and you answered, yes, that the shipper had the option to carry on unloading op-

erations in Jacksonville, Charleston, and Savannah, and Norfolk, or Baltimore, and you answered, yes. Now, does not the next paragraph, after the first paragraph of 21, provide in the case where the shipper notifies Grancolombiana of his choice of another port, after the vessel has sailed from Ecuador?

Examiner Robinson: I think that just speaks for itself. [fol. 289] Mr. Kharasch: Well, apparently it does not for Mr. Giallorenzi. I think we ought to have the witness' agreement. If you will permit him.

A. Yes.

Q. You agree?

A. Reads that way, yes.

Q. Now, I will ask you the question which was objected to before. Would it be correct to say that under your present arrangement with your present shippers, your ships load at Guayaquil, Ecuador and come to North Atlantic ports at the discretion of the shipper?

A. Subject to those particular conditions.

Q. Subject to the fact that they are the only ports named?

A. These are the names before me, conditions of unloading.

• • • • •

Q. Well, the answer to my question is, no. Do you know where the ships now load, your ships now load bananas at Ecuador? The particular place? Port?

A. Well, the name of the port?

• • • • •

Q. It's either Guayaquil, or Puerto Bolivar?

A. Yes.

• • • • •

Hearing Room 818  
November 6, 1958  
45 Broadway  
New York, N.Y.

JACK FRIEDLANDER was recalled as a witness, and having previously been sworn, was examined and testified as follows:

Direct examination.

By Mr. Kharasch:

Q. How did the seventy - seventy-two pound compare to the weight of the fruit arriving in Philadelphia?

A. I'd say approximately three to five pounds heavier than Philadelphia.

[fol. 290] Q. Heavier in Philadelphia?

A. Yes.

Q. Is there a reason for the Philadelphia fruit being heavier than the New York fruit?

Examiner Robinson: City of Brotherly Love, of course.

A. I don't know. Generally our bananas come from different areas, and the area from which the Philadelphia fruit is loaded, probably runs a little bit heavier in weight. At one time we were running substantially heavier in New York than in Philadelphia.

Cross examination.

By Mr. Kurrus:

Mr. Giallorenzi: Have you loaded ships at Puna?

The Witness: Grancolombiana vessels? Never.

Mr. Kurrus: I said other than Puna.

A. We loaded at either Guayaquil or Puerto Bolivar.

\* \* \* \* \*

Q. Mr. Friedlander, isn't it true that your total cost of bananas f.o.b. the vessel are greater in Puna than they are in either Guayaquil or Puerto Bolivar?

A. Substantially less in Puna.

Q. Do you pay an extra charge for transporting bananas to Puna than you not on the Grace Line ships, that you do not pay in transporting the bananas to the Grancolombiana Line ships?

A. Sometimes it costs us substantially less.

Q. Why is the cost greater on the Grancolombiana Line ships?

A. Cost of bananas from the area where we purchase the bananas is substantially higher.

\* \* \* \* \*

Q. Assuming that you have Puerto Bolivar fruit to be loaded at Puerto Bolivar, how would it compare to load that fruit, the cost, I mean, how would the cost compare to loading that fruit at Puerto Bolivar as opposed to loading it at Puna?

A. I wouldn't load Puerto Bolivar fruit at Puna, proved too costly.

[fol. 291] Q. Have you done it?

A. Yes, we've done it.

Q. How did the cost compare?

A. It was approximately 5 per cent higher.

Q. How about Guayaquil fruit, if you loaded that at Puna, and loaded at Guayaquil, how would the cost compare to that?

A. That would be about 5 per cent higher. Again, we wouldn't do it. Just like buying potatoes, if you live in New York, and buying them in Chicago.

Q. Where does the fruit for the Grace Line ships originate?

A. Adjacent to Puna.

Q. Do you know whether any originates in Guayaquil?

A. Very, very seldom.

Q. Talking about your own?

A. Our own?

Q. Does any ever originate from Puerto Bolivar?

A. Very seldom.

• • • • •

Redirect examination.

By Mr. Kharasch:

• • • • •

Q. Now, does the fruit that loads on the Grace Line vessels come from the same area in Ecuador that is loaded on the Grancolombiana Lines?

A. Not usually.

Q. Does not in your practice?

A. Not usually, sometimes, yes.

• • • • •

PHILIP R. CONSOLO was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lippman:

• • • • •

Q. You mention Puna, where is Puna, Mr. Consolo in relation to Guayaquil?

A. Puna to the best of my knowledge is about 25 to 30 miles south of Guayaquil, just a body of water there that Grace Line ships are not able to come up to Guayaquil because of a draft problem, they picked this particular body of water and put up four poles and call it Puna, where the ship anchors we have to get down to Puna to load.

• • • • •

[fol. 292] Q. Now, where does your fruit originate, Mr. Consolo?

A. Various areas.

Q. At the present time where does it originate?

A. Some originate from Vinkes, some originate from Baba, some originate from Duran and some originate from Balao.

Q. Are these places you mentioned closer to Guayaquil or Puna?

A. Three of the areas I mentioned are closer to Guayaquil and one area, Balao is of equal distance to Puna.

Q. If you can load your fruit at Guayaquil, would you be able to save any of these expenses?

Mr. Giallorenzi: I object to this question because the testimony is that the Grace Line vessels do not come up to Guayaquil because of the draft and I don't see how it has anything to do with proceeding for reparations.

Examiner Robinson: I don't either.

Mr. Lippman: Mr. Examiner, I think it has everything to do with the proceeding for reparations.

Examiner Robinson: Why?

Mr. Lippman: Mr. Consolo is establishing his costs at the present time. Now, in order to show that he is entitled to reparations we should be able to prove whether or not those costs were decreased if he had been a shipper on Grancolombiana Lines, if he had space on Grancolombiana Lines, in other words, neither one of those ships goes up to Guayaquil.

\*     \*     \*     \*     \*

The Witness: Yes.

Q. Will you explain your answer? In what respect will you be able to save on the expenses?

A. As you notice as you go down these expense sheets where it says Naranjal, where it says Baba, fruit from this area, Duran, fruit from this area for a barge transportation or canoe transportation would be one sucres cheaper to Guayaquil than it is to Puna and on the stevedoring expense when we take men to Puna we have to pay one and [fol. 293] half the rate as is paid in Guayaquil, plus the cost of canoe and tug service to Puna, plus the meals that we have to provide the men.

\*     \*     \*     \*     \*

Q. Suppose you had steamship space available enabling you to ship additional 14,000 stems or some lesser amount than you have been shipping, what effect would that situation have upon your costs in Ecuador?

A. None. As a matter of fact, it may lessen my overhead. I would have to maintain the same office and the same management and the only additional expense would be extra selectors for these additional shipments so that maybe instead of paying 7 per cent to the local company, I may have reduced that to 5 per cent, that is the only difference I could see.

Q. If you could ship a greater volume?

A. Yes.

•   •   •   •   •   •   •

Hearing Room 818  
November 7, 1958  
45 Broadway  
New York, N.Y.

•   •   •   •   •   •   •

By Mr. Lippman:

Q. Mr. Consolo, at the conclusion of the hearing yesterday we were discussing the exhibit marked 24 for identification.

A. Yes.

•   •   •   •   •   •   •

A. When I was discussing with Mr. Penaranda and Mr. Borrero there was a question of three ports to come to; either Baltimore—we talked about Philadelphia or New York.

Now, it is important in the banana business to try to get your bananas out to the port which after the ship leaves Buenaventura it comes directly to a North Atlantic port, which may be Baltimore first, which may be Philadelphia or New York, and they told me that Baltimore would be the first port that they would call at that time, probably Philadelphia—the first port before they would take off general cargo.



[fol. 294] When I wrote this letter I wanted to establish the port that they would come first before taking off general cargo, whether it was Baltimore, Philadelphia or New York, and I was in agreement to take either one of those three ports provided it was the first port of call into the United States before taking off general cargo, and of all my experience I never heard of a contract on a shipping company where a shipper can ask from ship to ship where he wants the ship to be discharged with prior notice before the loading. I have been operating with Grace Line for five years—

. . . . .

Q. Are you able to obtain approximately 12,000 to 14,000 additional stems in Ecuador for export to the United States?

A. Yes.

Q. On what do you base your ability to do so, Mr. Consolo?

A. From our experience in Ecuador and the availability of bananas in Ecuador, our financial ability, and our know-how in the business.

Q. Would you be able to sell an additional 14,000 stems of bananas in the United States?

A. Yes.

. . . . .

Q. On what do you base your ability to sell 14,000 stems of bananas a week in the United States?

A. With our present experience, with our commission merchants, with our commission agents, or selling them directly ourselves to the trade.

Q. Have you had any recent experience, Mr. Consolo, which demonstrates your ability to do this kind of thing?

A. Yes, I have.

Q. Would you explain what that consists of, Mr. Consolo?

A. August of 1958 I went into a temporary arrangement with the Chilean Line for the export of bananas from Ecuador to Baltimore. This is an irregular sched-

ule, calling Ecuador Puna—rather, every two weeks or less or more.

In other words, no regular set day for its arrival in Ecuador, and this was operated from two trips to two-trip basis, and the last one from trip to trip, and we were able to purchase bananas in Ecuador to load these ships and sell them in the United States at a comparatively [fol. 295] same sales and purchase them in Ecuador for approximately the same price that we purchased our regular shipments on the Grace Line.

Q. Mr. Consolo, at all times since November, 1955, could you have purchased up to an additional 14,000 stems of bananas in Ecuador for export to the United States?

A. Yes.

Q. At what price?

A. The same price we are paying—we paid during that period.

Examiner Robinson: Let's still tie it down a little further.

You say 14,000 stems?

The Witness: Yes.

Examiner Robinson: Over what period?

Mr. Lippman: I said at all times since November, 1955.

Examiner Robinson: I know.

Do you mean by that for each shipment, otherwise it could go for 14,000 stems over a three-year period?

Mr. Lippman: I think the record should clearly reflect that my question is premised upon 14,000 stems each week.

The Witness: Yes.

Q. Could you have purchased that amount of bananas?

A. Yes.

Q. In Ecuador?

A. Yes.

Q. At what price?

A. At the same price that we paid during that period.

Q. In connection with your Grace Line shipment could you have sold an additional 14,000 stems each week in the United States at prevailing market prices?

A. Yes.

Q. Could you have sold such bananas if they had arrived at Philadelphia instead of New York?

A. Yes.

Q. At what price?

A. About the same price.

Q. Would it have made any difference from the standpoint of the proceeds of the bananas if the vessel had arrived in Philadelphia instead of New York?

A. I don't see any difference.

[fol. 296] Mr. Kharasch: Mr. Examiner, may we go off the record for one minute?

Examiner Robinson: Yes.

(Off-the-record discussion.)

Q. Mr. Consolo, have you had any shipment on the Chilean Line which arrived at Philadelphia?

Mr. Giallorenzi: You didn't go to Philadelphia.

The Witness: They made one trip to Philadelphia. They requested it was more convenient for the ship to discharge there.

A. (Continuing) Yes, I think there was one shipment that went to Philadelphia.

Q. Will you speak up, please.

A. Yes, there was one shipment that went to Philadelphia.

Q. Which shipment was that?

A. That was shipment No. 4.

Q. When did that arrive in Philadelphia?

A. It arrived in Philadelphia October 24, 1958.

Q. What was the vessel?

A. The vessel was the steamship Maipo.

Q. How many stems were shipped on that shipment?

A. 6,168 stems.

Q. Were those bananas sold by R. Dixon & Co. for your account?

A. Yes, they were.

Q. Did that vessel arrive in Philadelphia?

A. Yes, arrived in Philadelphia at Pier 66, South Philadelphia.

Q. Did R. Dixon & Co. get the same price for those bananas as could have been obtained for bananas arriving on the Grace Line at the same time during the same period.

A. Yes.

Q. Were such prices, in fact, realized?

A. I should hope so.

Q. Mr. Consolo, could you refer to your records and show us?

A. Yes.

Q. This vessel arrived on October 24, 1958, is that correct?

A. That is correct.

Q. Would you refer to your records to show us the nearest arrival on the Grace Line, the arrival nearest to October 24, 1958?

A. October 23, 1958, the day before.

[fol. 297] Q. Which vessel was that?

A. That was the Santa Ines.

Q. That vessel arrived at New York?

A. Java Street, Brooklyn, New York.

Q. The bananas were sold in New York?

A. Yes, they were.

Q. What price was obtained?

A. Practically the same price.

Mr. Giallorenzi: Is that a responsive answer?

Mr. Lippman: You can read the prices, Mr. Consolo.

The Witness: Yes.

Q. What price was obtained on the bananas shipped on the Chilean Line?

A. The price obtained on the bananas shipped on the Chilean Line for select bananas was \$8.50 per hundredweight with the exception of one, two, three, four, five trailers. Two were received at \$8.00 per hundredweight, one was received at \$7.50 per hundredweight and two were received at seven cents per hundredweight.

Q. In those trailers how many stems were involved?

A. Those trailers that were involved: 280, 350, 321, 340, and 500.

Examiner Robinson: Let me ask you something. Did you actually mean a hundredweight or a hundred pounds?

The Witness: The price?

Examiner Robinson: No, on the stems. Do you mean a hundredweight or a hundred pounds?

Mr. Kharasch: There was also an expense of seven cents per hundred pounds.

The Witness: Seven dollars per hundred pounds.

Q. That was out of a total shipment of 6,168 stems?

A. I want to elaborate on these prices.

Q. What was the reason for the lower prices on those five truckloads?

A. In Ecuador we have one of our suppliers who has small fruit, referred to eight hands, instead of the regular.

Q. Is that the name of the supplier or the fruit?

A. The fruit.

Examiner Robinson: Off the record.

(Off-the-record discussion.)

[fol. 298] The Witness: We had a supplier on this particular shipment in Ecuador who had eight hand bananas who wanted to sell them to us and we agreed to buy them for about 40 per cent of the value of the others, and the cost sheet in Ecuador will so reflect the cost.

Although I received the prices I have stated per hundred pounds here I realized more profit in dollars than if I had bought regular nine hand and better at the prevailing prices in Ecuador.

Q. Will you refer—

The Witness: (Continuing) That was only a business adjustment. It has no reflection on profits where you see the lower price there.

Q. Will you refer to the Grace Line arrival of October 23rd.

A. Yes.

Q. What were the prices which those bananas were sold, Mr. Consolo?

A. All the select fruit was sold at \$8.50 per hundred pounds with the exception of one local trailer with a hundred stems at \$8.00 per hundred pounds.

Q. How did the ripes and rejects for those shipments compare, Mr. Consolo?

A. It varies on each cargo the amounts of ripes and rejects.

Q. What about the experience on this Chilean arrival as compared with the Grace Line arrival?

A. Some have a little less percentage of ripes on the Grace Line. I would have to go over the records.

Q. I am talking about this particular shipment.

A. The ripes and rejects of 6,168 was 215 stems ripes and rejects.

Q. That is the Chilean Line?

A. Yes.

Q. And the Grace Line vessel?

A. 5,624 stems, about 430 stems of ripes and rejects.

Examiner Robinson: Off the record.

(Off-the-record discussion.)

Q. The number of stems arriving on the Santa Ines, what was the total number?

A. I can see from this record it was 5,624.

• • • • •

[fol. 299] Cross examination.

By Mr. Giallorenzi:

• • • • •

Q. You testified that you were engaged in the banana business under the name of Philip R. Consolo?

A. My contract with Grace Line is under Philip R. Consolo.

Q. Do you engage in business under any other names since that date?

A. Yes. I have corporate names that I use.

Q. Will you please tell us the names of the corporations that you have used from 1953 to date?

. . . . .

A. We have operated in Ecuador under Pacific Fruit Company, and presently as Ecuador Fruit Company.

In the United States under Atlantic Fruit Company and as Dover Banana Company.

. . . . .

Q. Is that all?

A. There is others I have operated.

Q. In the banana business since the early part of 1953, is that right?

A. The early part of '53.

. . . . .

Q. Now turn to Ecuador Fruit Company.

A. Yes.

Q. Is that an Ecuadorian corporation?

A. Yes, it is.

Q. Are you an officer of that corporation?

A. Ecuador Fruit Company?

Q. Yes.

A. No, I am not.

Q. Are you a stockholder of that company?

A. Yes.

. . . . .

Q. Are you the sole stockholder of the company?

A. No, I am not.

Q. Are you the majority stockholder of the company, Mr. Consolo?

A. Yes, I am.

. . . . .

[fol. 300] Q. Is Ecuador Fruit Company the successor to Pacific Fruit Company, Mr. Consolo?

A. Yes.

Q. And Pacific Fruit Company was formed about three months after you received the Grace Line space contract?

A. Just about, I would say—three or four months, I don't know the exact time.

Q. This company is your buying agent, as I understand it, in Ecuador?

A. I don't say it's a buying agent—it's a buying company. It buys bananas to sell bananas.

Q. Will you explain that to me?

A. It is a company, it is a separate company operating in Ecuador under the laws of Ecuador to buy and sell bananas and go into any business that it deems necessary to go into.

It isn't confined just to buying and selling bananas. It's a corporation standing on its own right in Ecuador to do business.

Q. So that the two companies that it buys bananas for for distribution in the United States are yours and the Dover Banana Company?

A. Presently?

Q. Yes.

A. Yes.

Q. When was Dover Banana Company formed?

A. I would have to look at my records.

Q. To your best recollection, Mr. Consolo.

A. I believe in about 1957, April or May of 1957.

Q. Do you know under the laws of what state it was formed, Mr. Consolo?

A. I think it's under the law and State of Delaware.

Q. Can you tell me where the principal place of business is, Mr. Consolo?

A. Miami, Florida.

[fol. 301] Q. Are you the principal stockholder of this company, Mr. Consolo?

A. No, I am not.



Q. Do you know who is the principal—

A. Yes.

Q. Would you tell us, please?

A. Charles Consolo.

Q. That is your brother?

A. Yes.

Q. Are you an officer of this corporation?

A. No, I am not.

Q. Are you a director of this corporation?

A. No, I am not.

. . . . .

Q. Does Dover Banana Company have a space contract with Grace Line?

A. No, it does not.

. . . . .

Q. I notice on your Exhibit 26, outturn report of R. Dixon—

A. Yes.

Q. (Continuing) —involves a shipment which arrived on October 23, 1958 on the Santa Ines?

A. Yes.

Q. This statement you testified was prepared by your agent, R. Dixon & Co., is that right?

A. That is correct.

Q. I notice that it is addressed to Dover Banana Company, Inc., is that right?

A. Yes.

Q. Were these bananas imported for the account of Dover Banana Company, Inc.?

A. Yes, they were.

Q. That was using your space?

A. That is correct.

Q. Did you receive any compensation for that, from Dover Banana Company, Inc.?

A. Yes, I did.

. . . . .

Q. Since Dover Banana Company, Inc. was formed, do you know how many shipments of bananas were carried on the Grace Line for its account?

A. Well, I would have to go back to the records to find out how many.

[fol. 302] A. October 30th there would be sixty-five shipments from Dover Banana Company.

Q. They were all on the Grace Line, which you held the space contract, is that right?

A. Not I alone.

Q. Would you please explain to us what you mean by that last statement, Mr. Consolo?

A. I had three-quarters of a chamber and Charles Consolo has one-quarter of a chamber.

The Witness: Yes. Charles Consolo is my brother and associated in this business.

Q. Did the Grace Line enter into a space contract with your brother?

A. Yes.

Q. Was that in the name of Dover Banana Company, Inc., Mr. Consolo?

A. Yes.

Q. Or Charles Consolo?

A. Charles Consolo.

Q. So that the sixty-five shipments which were carried on the Grace Line were outturned from that one particular chamber that you and your brother have individually?

A. That is correct.

Q. And the sale of these bananas, the proceeds, were credited by R. Dixon & Co. to Dover Banana Company, Inc., is that right?

A. That is correct.

Q. Did you have an agreement with Dover Banana Company, Inc. for the purpose of letting them use the space on the Grace Line vessels which amounts to three-quarters of one chamber?

A. Do I have an agreement?

\* \* \* \* \*

Q. Do you have any such agreement?

A. Not in writing. There is no written agreement.

Q. Do you have an oral agreement for them to use this space, Mr. Consolo?

A. They are using the space for the importing of the bananas into the United States.

[fol. 303] Q. Is that pursuant to an oral agreement that you entered into with Dover Banana Company, Inc?

Examiner Robinson: If it is not in writing, I think we will have to assume it is.

Mr. Giallorenzi: All right.

Q. When did you enter into this oral agreement with Dover Banana Company, Inc. where you allowed them to use three-quarters of your chamber on the Grace Line?

The Witness: Let me verify that a little bit. The first nineteen shipments under Dover Banana Company—eighteen, rather, was the space held under Philip R. Consolo.

Q. On the Grace Line?

A. Yes.

Q. Go ahead.

A. Then I think October—the next shipment from there on was three-quarter space under my name, when the new contracts came out, and one-quarter space under Charles Consolo.

Q. When did you enter into this oral agreement with Dover Banana Company wherein you allowed them to use three-quarters of your space, all of the three-quarters of the chambers which you had contracted with Grace Line?

Mr. Kharasch: Before you answer that question, Mr. Consolo—

I have a continuing objection to this inquiry, because it does not bear on the issues in this case, and I want to advise Mr. Consolo of his—I guess it is a constitutional right to consult with his attorneys if he wishes to, before he answers questions along this line.

Mr. Giallorenzi: Now I have something to say about that, Mr. Examiner.

Examiner Robinson: You do not have to say anything. I have already ruled that it is all right.

\* \* \* \* \*

Mr. Lippman: Mr. Examiner, I want to interpose a further objection on the ground that there is no foundation laid in the record as to the existence of any agreement.

[fol. 204] Examiner Robinson: We are trying to dig it out.

Mr. Giallorenzi: The witness has been—

Mr. Lippman: You are putting words in the witness' mouth.

Examiner Robinson: Let's not harangue about it.

I think you have got to get to the bottom of it. It may turn out to be nothing.

I think this goes to the very essence of your claim.

\* \* \* \* \*

Q. Is there any agreement between you and Dover Banana Company for the use of your space aboard the Grace Line?

A. There is an oral understanding.

Examiner Robinson: We are getting somewhere.

When was it?

The Witness: From the first shipment, shipment No. 1, July 30, 1957.

Q. Is that agreement still in effect now, Mr. Consolo?

A. The understanding is still in effect, yes.

Q. With whom did you enter into that agreement on behalf of Dover Banana Company, Inc.?

A. With Charles P. Consolo, who is the President of Dover Banana Company.

\* \* \* \* \*

Mr. Kharasch: Meanwhile, my request—

Examiner Robinson: Certainly?

Mr. Kharasch: (Continuing) —for a recess, during which I will publicly consult with my client.

Examiner Robinson: You go right ahead.

(A short recess was taken.)

Mr. Giallorenzi: What was the last question and the answer, if any?

(Reporter reads back the last question and answer.)

\* \* \* \* \*

[fol. 305] Q. Will you tell us the terms of this agreement or understanding which was entered into between you and the Dover Banana Company, Inc.?

A. They would use the space, Dover Banana Company would use my space and buy bananas for one of my corporations.

Q. What consideration did you receive for the use of this space, Mr. Consolo?

A. Selling them bananas.

\* \* \* \* \*

Q. Will you please tell us for whose account the bananas which arrived on the S.S. Santa Olivia were sold?

A. For the account of Dover Banana Company.

Q. Was the net proceeds of \$11,852.68 remitted to Dover Banana Company, Inc.?

A. That is correct.

Q. You testified that in consideration of your giving your space to Dover Banana Company, Inc.—

A. I didn't give it to him, I made them use it.

Q. —you testified that by you making them use it, they would buy bananas from your corporation?

A. That is correct.

Q. Which corporation is that?

A. That is an intermediary corporation.

Q. Intermediary corporation?

A. Yes.

Q. If that be so, why did R. Dixon & Co. show on Exhibit 24 that the bananas were sold for the Dover Banana Company rather than the intermediary corporation?

A. Because the intermediary corporation sells the bananas to Dover Banana Company in Guayaquil.

\* \* \* \* \*

Q. What is the name of the intermediary?

A. Darien Refrigerated Shipping Company.

Q. Is that an Ecuadorian corporation?

A. No, sir, it is not.

Q. Do you know under the laws of what country or what state that company was formed?

A. Panama.

Q. Panama?

A. Yes.

[fol. 306] Q. Are you the principal or sole stockholder of that company, Mr. Consolo?

A. I am the majority stockholder of that company.

Q. Is your brother Charles Consolo associated with you in that company, Mr. Consolo?

A. No, he is not.

Q. Are you an officer of that company?

A. No.

Q. Are you a director of that company?

A. No, I am not.

Q. Are these bananas sold by your intermediary corporation to Dover Banana Company, Inc. before they are shipped on the Grace Line vessels?

A. They are sold to them F.O.B. Guayaquil.

\* \* \* \* \*

Q. Referring to Exhibit 24—

A. Yes.

Q. —the fruit which was purchased from various growers—

\* \* \* \* \*

Q. Was that fruit purchased by the Ecuador Fruit Company?

A. Yes, it was.

Q. For the account of this Panamanian corporation?

A. Correct.

Q. Then in turn the Panamanian corporation sold it to Dover, is that correct?

A. That is correct.

\* \* \* \* \*

Q. —you testified that funds were remitted for the purpose of purchasing the fruit and meeting the other incidental expenses set forth therein?

A. Yes.

Q. And that there was also a bank expense of 74.52 sucres, is that right?

A. Yes, that's right.

Q. Did you personally remit those funds or did the Darien Corporation remit them?

A. Darien Refrigerated remitted this fund.

\* \* \* \* \*

Q. The Ecuadorian Fruit Company, Incorporated, the fruit which they purchased in Ecuador?

A. Yes.

Q. —is that all for the account of Darien Refrigerated Company, Mr. Consolo?

A. Yes.

Mr. Giallorenzi: Thank you.

\* \* \* \* \*

[fol. 307]

Hearing Room 705  
November 11, 1958  
45 Broadway  
New York, N.Y.

(Mr. Consolo resumed his testimony.)

Examiner Robinson: Gentlemen, I'm ready whenever anybody else is. Have we decided where the witness will sit?

Cross examination.

By Mr. Giallorenzi:

Q. Now, you testified at the last hearing, I believe that you have three-fourths of the space of the No. 4 upper tween deck on the Grace Line vessel under a present contract. And that your brother, Charles Consolo, has one-quarter of the space?

A. Yes.

The Witness: That's on the freighters.

Q. And how many cubic feet would you say you and your brother have jointly?

A. I would say in the neighborhood of about 26,000.

Q. How many cubic feet would it take for each banana to load—

Q. Well, assuming you have an 80-pound stem?

A. I would say on an 80-pound stem you could load around 5,800 to 6,000 stems.

Q. And that prior to October, 1958, Turino gave up one-quarter of the No. 4 lower tween deck and that was taken



over by Mr. Pallis of Banana Distributors? Did you know, Mr. Consolo, that Swanee and El Morro and Lebantino and Turino were going to give up their space on the Grace Line vessels?

Mr. Kharasch: As of what time?

Q. Let us fix it as of October, 1958?

A. I did not know definitely, but there was talk about it. [fol. 308] Q. Did you know prior to October, '58 that there was talk about some of the Grace Line shippers giving up their space?

A. There was talk about it.

Q. Did you know when this talk commenced?

A. I don't know, I think I was called up from Miami to a meeting of all shippers on the Grace Line, the exact date I don't know, may have been in, I can't fix the date exactly.

Q. Well, did you attend that meeting or meetings of all the Grace Line shippers in 1958?

A. Well, I attended two meetings, that was all.

Q. Yes. Now, tell us and fix it as best you can when these two meetings were held?

A. I can't fix them, may have been in the spring of '58 I think, and then there was one in maybe, in the summer of '58, in that neighborhood.

\* \* \* \* \*

Q. Did you ask Mr. Grossman what was the purpose of coming up to New York?

A. Well, there were several things discussed, several things. The question of reduced rates of the Grace Line, and the question of trying to get a minimum of freight weight for a certain period, the market was bad, a question of trying to get, some talk on the question of trying to get Standard Fruit on the ships and everybody giving up a little space to Standard Fruit, and things like that, nothing materialized, put it that way.

\* \* \* \* \*

Q. Who was present at the first meeting in the spring of 1958, Mr. Consolo, to the best of your recollection?

A. Mr. Staff was there. Mr. Morey was there. Mr. I. B. Joselow was there. Mr. Lavilla and Indies Fruit Company. Mr. Lou Kurtz from the El Morro, I think that Mr. Parver, Mr. Lou Grossman, I was there, Mr. Consolo. There was an attorney Mr. Jack Friedlander was there, too, I don't remember this meeting whether there was Mr. Sawanee, Mr. Levitt, Bill Levitt, from Sawanee, I think he was at the second meeting, I don't remember whether Mr. Levitt was there. That's the best of my memory.  
[fol. 309] Q. Was anybody there representing Naboa or Frutera?

A. Yes, Mr. Lovella was.

Q. And Naboa?

A. I don't think Naboa was there, I think Mr. Siminari second meeting.

Q. Did anybody keep an agenda of what was discussed?

A. I don't know, I think Mr. Staff was taking notes. I didn't keep an agenda, there was a general discussion, and everybody came up to listen to what everybody else had to say.

Q. What was the condition of the banana market then in the United States?

A. It was poor.

• • • • •

A. I think the market was poor, I think it started some time in January.

Q. Of 1958?

A. '58.

• • • • •

A. I think that meeting, I don't know whether the first or second meeting, trying to get together to submit a, I think the first meeting to appoint a committee to go to the Grace Line to try to reduce the freight rate, and try to get a waiver of the minimum load. I believe that was the purpose of the first meeting. If I remember correctly, we talked about many things, general conditions and Ecuador fruit wasn't arriving too good in the United States, large percentage of ripens. That was about the only things I remember of that meeting.

Q. So, in other words, at that meeting you do remember you discussed the condition of the fruit which was coming in bad and that the price of the bananas in New York was poor?

A. Well, something else was discussed, there was a plan, a discussion about trying to get a central selling organization, there were too many selling organizations on the same ship. In other words, R. Dixon was there, Joselow, Mr. Staff was selling bananas, and Banana Distributors was selling their fruit, I don't think that Naboa was in that picture, he was selling Morro's, and what's this other fellow, Martin Associates, and the Indies selling their own fruit and too many prices being quoted, over the same ship, trying to get a central organization if we could get a company to sell the fruit in the account of all of the importers.

\* \* \* \* \*

[fol. 310] Q. Now, this committee, you testified to that was going to approach the Grace Line, for talks affecting the freight rates, do you know who it was, was any committee appointed?

A. I think there was, yes.

Q. Do you know who the gentlemen were?

A. Mr. Staff, Mr. Parvin and myself.

\* \* \* \* \*

Q. Who went to the Grace Line?

A. Mr. Staff, Mr. Parvin, and myself.

\* \* \* \* \*

Q. And did you ask him to reduce the minimum and make other requests?

A. Yes, we did.

\* \* \* \* \*

Q. And that was requests that had been made you testified to because the fruit business was bad, the banana business was bad?

A. And the fruit wasn't coming in good quality, and that was it.

Q. Now then, you said you held a second meeting, which was in the summer, 1958, is that correct, Mr. Consolo?

A. That is correct.

Q. And did you appear at that meeting?

A. Yes, I did.

Q. What did you discuss at that second meeting?

A. Discussed at that second meeting, about the same thing, with the exception of trying to get each firm that exports bananas to the United States who had their own company in Ecuador to instruct the companies to try to get a stricter selection, better quality of fruit to come into the United States, and we had Mr. Siminari, I think, who was there, too, of the growers' association, to go to Ecuador and try to get a tax reduced, the export tax, and try to get the exchange reduced to a dollar, or seventy-five cents instead of \$1.20 or \$1.50, gives you more sucres on the open market and then Mr. Lovett, came up to propose that he would speak to the Standard Fruit Company, Standard Fruit Company wanted two or three chambers [fol. 311] on the Grace Line, if everybody would give up a little space in proportion, to give two or three chambers, there was some discussion about this, and about, I think, I made a statement I said I don't think we should talk to the Grace Line, I said that was a matter for the Grace Line. Later on I called up Mr. Wagner and asked him that if two or three chambers be given up from present shippers, would he give it to the Standard Fruit Company, directly, we didn't want another shipper in it, because there was no purpose in having another shipper in it, and he says he would not. He says anybody wants to give up their space let them write letters in requesting to be relieved of their contract. So I didn't pursue that any further when I knew from the head that the space would not be guaranteed to give to the Standard Fruit Company.

Q. Was there a request for a lower minimum on other conditions reviewed after the September meeting, or rather after the meeting in the summer of 1958?

A. I think Mr. Joselow said he was going to ask not for a reduction in rate, he was going to take the initiative, wanted to reduce the minimum and rather than ship 100 per cent minimum, ship 66 per cent, or 75 per cent, he was going to approach the Grace Line on that subject.

Q. Do you know whether he did that?

A. No, I do not.

Q. This request to reduce the minimum was because bananas were not as good as they had been?

A. I would say that was part of it, and the poor market in the States.

Q. A combination of both?

A. Yes.

Q. And the second meeting, other than discussing giving up this space in favor of Standard Fruit Company, did anybody else state he would give up his space?

A. Everybody talked about something. This was the banana business, we don't trust anybody. Put it that way. There was talk about Staff giving up a half a chamber, talk about Lovett giving up half a chamber, talk about me giving up a quarter of a chamber.

[fol. 312] Q. How about Pallis?

A. Everybody was mentioned in the discussion. About the space, that's not saying we would have carried out, just talk.

Q. But there was talk about giving up space?

A. That is correct.

Q. And that talk then became a fact when Sawanee and Lebantino and El Morro, Turino gave up space, Grayson also?

A. From their point of view, it was a fact they gave up.

Q. When did you first learn that they definitely were giving up space, that is, Sawanee and Grayson, Lebantino, El Morro, and Turino?

A. I learned about it after the Grace Line awarded this space to whoever received it from Naboa, West Indies, and I was kind of disturbed about it, I called up the Grace Line, told them the least they should have done was notify me that they had letters in their possession of certain

people giving up space, and offering me some of it. Whether I would have rejected it or not, that is something else.

Q. Did you confirm that conversation in writing?

A. No, I did not.

• • • • •

Q. Between the summer of 1958 when you had the second meeting and when the Grace Line gave this space to these different chaps or firms that people were intending, shippers were intending to give up space?

A. There was talk about it.

Q. There was talk about it?

A. Yes.

Q. Did that arouse your curiosity?

A. Yes.

Q. And did you feel it wise at that time to inquire of the Grace Line?

A. Yes, I did.

• • • • •

A. I asked after these conversations after this meeting I was always in contact with the Grace Line, I was always checking with them, I asked them if they had received these letters, in other words, there was talk of people going to give up, I asked, I think Charlie Nash, I don't remember [fol. 313] exactly, I spoke to both of them if they had received letters from shippers requesting to be released from their contract, and he says no, I haven't received a single letter yet.

• • • • •

Q. Now, did you inquire again of him?

A. The next time I inquired about him was after they were given out and I talked to him. At least, I should have been notified.

Q. Now, you knew, or you had some inkling they were going to give some space to speak about it?

A. Yes, there was talk about it.

Q. Did you request in writing that you be given space?

A. No, I did not in writing.

Q. Why not?

A. Because my contact with the Grace Line, I didn't think it necessary to write letters.

Q. If it was necessary for the others to write letters and you inquired why didn't you put yourself on record that you wanted space?

A. Because I was constantly in touch with them, I spoke to the Grace Line two or three times a week.

Q. And still you didn't think it necessary to write a letter requesting space, although you thought it was necessary for the other shippers?

A. No.

Q. Isn't it a fact—

Examiner Robinson: Just a minute.

Mr. Kharasch: Objection, arguing with the witness.

Q. Isn't it a fact at that time you didn't want any additional space and that is the reason why you did not put a request in writing?

A. It is not.

\* \* \* \* \*

Q. Isn't it a fact that the reason you didn't request space in writing from Grace Line prior to October, 1958 was due solely to the fact that you did not need the space, did not want it?

A. That is not so.

\* \* \* \* \*

[fol. 314] Q. Now, prior to July 20, 1958, do you know whether the Chilean Line went down the West Coast of South America?

A. Yes.

Q. And you knew that they had gone down that coast for quite some time?

A. Yes.

Q. Why didn't you request space prior to July 28, 1958 from the Chilean Line?

A. I think there was one time before that, I don't remember whether '57 or '56, I don't remember the year now, I went up to see Mr. Campion, at that time, and asked

him for his schedule, on the Chilean Line, and he couldn't give us a schedule every two weeks, it ran every eighteen days, every twenty days, and at that time the ships were stopping at Havana, this is, I'm quoting now what he told me, and that he couldn't guarantee an arrival date into the United States, maybe twelve, thirteen to fourteen—well, at those late days arrival, I was not interested in shipping bananas. Now I discussed it with him on this particular trip, the ship was not going to call—as a matter of fact, one ship before that, I was going to book, but that ship was going to call at Havana, and stop for forty-eight hours, he says, seventy-two hours, I says that ship I don't want, I says they have to guarantee there was going to be a schedule every two weeks, and some ships were not going to call Havana, come direct from Puna to Baltimore. I pick the Port of Baltimore, because he says it takes eight to nine mornings for arrival in New York, but he wanted to put a maximum of eleven days to cover himself in the contract, but the understanding was the ship was in Baltimore before the eleventh morning, eighth, ninth or tenth, and that is the reason why I went into this deal with the Chilean Line this time because of the arrival dates, in New York, and bananas were arriving in good condition eighth, ninth and tenth morning.

Q. Well then, your principal objection to the Chilean Line service prior to entering into these contracts, Exhibit 34, was that as a regular port of call on their northbound service they stopped at Havana for a period up to forty-eight hours?

A. Well, I didn't care how many days they stopped at [fol. 315] Havana, they got a right to stop at Havana, now, but I didn't want no maximum or eleventh morning in Baltimore arrival for the bananas.

Q. Well, I thought your testimony was that you were not interested in Chilean Line service prior to this date because they called at Havana, that you only became interested when they assured you they would omit the Havana call and they arrived in Baltimore a maximum of eleven days. Was that the conversation you had with Mr. Campion?



A. Yes, they still have a right if they want to put in a call into Havana, the contract doesn't state they have to come directly to Baltimore. They have a right to stop, but they cannot come any later than the eleventh morning to Baltimore, and he told me they are not going to stop at Havana and that the arrival date in Baltimore would be sooner than eleven days.

Q. When you say he, I assume you are referring to Mr. Campion?

A. Yes.

Q. If Mr. Campion told you that the vessels would not omit Havana as a port of call, would you have used them?

Examiner Robinson: Was that expressed in these contracts?

The Witness: Because it depends on what day he would arrive in the United States, what morning for the delivery of the bananas.

Q. Isn't it a fact it all depended on how long they stayed in the Port of Havana?

A. They have that call, they know what they have to load.

Examiner Robinson: What you are interested in is lapse of time for the ship to arrive for discharge?

The Witness: Yes.

Q. Do you know how long the Chilean Line vessels used to stay at Havana when they arrive there?

A. No, I do not.

Q. Do you know whether one day or five days?

A. No.

Q. Do you know whether any Chilean vessels have made a run from Guayaquil to New York, or Baltimore, including stop at Havana, in eleven or less days?

A. No, I don't know.

[fol. 316] Q. If the usual trip of the Chilean Line, stopping at Havana, which was a regular port of call on the northbound voyage was more than eleven days, would you have booked with them?

A. If it ran over to the twelfth morning delivery, as a regular schedule, I would not have booked them.

Q. When did you learn that the Chilean Line dropped the Havana line port?

A. Information from Captain Roza who sent me a schedule for the entire year after July of 1958 as to when the ships were going to call at Puna and when they were going to arrive at Baltimore, I have the whole year advance schedule.

Q. Is it your testimony that prior to July 20, 1958 you did not know they were going to drop that Havana port?

A. No, I did not. I couldn't, in July, maybe two weeks after that, when I spoke to them over the phone.

Q. You didn't know they were going to drop Havana?

A. He says one more ship going to call Havana and he said after that one, not going to call there.

Q. Well, isn't it a fact you called Mr. Campion when you learned that vessels were not going to stop at Havana?

A. No, I called him to find out what the schedule was going to be, on the Chilean Line, I did not know anything at the time that I spoke to Mr. Campion, or Mr. Slattery, Campion was on vacation.

Q. You spoke to Mr. Joseph Slattery?

A. I think that is it, and I spoke to Captain Roza.

Q. And Campion at that time when you first called was on vacation?

A. Yes, I believe he was on vacation.

Q. And you say at that time you did not know they were going to drop the Havana call?

A. No, I did not.

Q. Now, when you had made inquiries prior to this particular time in July, 1958 as to the number of days that the vessels would take to come from Guayaquil to New York, did you know how long they would take to make that run?

A. If it came directly to my knowledge?

[fol. 317] Q. No, if that vessel stopped at Havana?

A. No, I did not know, because they told me at that time they would not guarantee any tenth or eleventh morning arrival in New York, so at that time the ships just come

to New York, couldn't guarantee any tenth or eleventh New York arrival.

Q. Would you consider any vessels which stopped at a South American port northbound after loading bananas at Guayaquil, would you consider that service suitable?

A. Yes. The Grace Line does that, all their ships northbound.

Q. What ports do the Grace Line stop at?

A. To the best of my knowledge I think they stop at Buenaventura and this one, the name I spoke of, I think they call at two ports making the fishing date going southbound and picking up the fishing date coming northbound.

Q. How long did they stop at Buenaventura, the Grace Line vessels?

A. I don't know the exact time.

Q. Well, approximately?

A. They're supposed to claim twenty-four hours to thirty-six hours.

Q. To your knowledge, thirty-six hours?

A. No, in the contract, it says that.

\* \* \* \* \*

Q. Well, the selling price would not be affected by dates of arrival, it would be affected by other circumstances?

A. That is correct.

\* \* \* \* \*

Q. Did you consider making a bid for a part of the entire space a proper bid?

A. Did I consider it?

Q. Yes. For the entire space a proper bid?

A. I don't understand the question.

Q. Well, when you made this bid on March 6, 1957—

A. Yes.

Q. —did you consider bidding for the entire space with the exclusion of other shippers as a proper bid?

A. I only bid at the request of the Grancolombiana Line. If they had asked me to bid on one chamber, or offered me one chamber, or parts of a chamber, at a given figure, I would have responded to it.

\* \* \* \* \*

## Cross examination.

By Mr. Giallorenzi:

\* \* \* \* \*

[fol. 318] Q. You testified that the entire No. 4 upper tween deck which is used by you and your brother on the contract, I don't know who it is used by on the contract, did carry at least 6,000 stems?

A. Depending on the size of the stems.

Q. Pardon me?

A. Depending on the size of the stems, about 57 to 63, that's depending on the size of the stems. I think that's about the figure.

\* \* \* \* \*

LOUIS F. MEYER being first duly sworn testified as follows:

## Direct examination.

By Mr. Lippmann:

\* \* \* \* \*

Q. Let's see if we can clarify that a little bit, Mr. Meyer. Do the same customers look to you for bananas more frequently than once a week?

A. Oh, yes.

Q. Do they purchase from you more frequently than once a week?

A. That's right.

Q. These are the same customers?

A. That is right.

Q. If you were not able to, or if you had no bananas to sell them, would they have to go elsewhere for their requirements?

A. Definitely.

Q. From the standpoint of your ability to sell bananas, Mr. Meyer, would it make any difference whether the bananas arrived at Philadelphia, or New York?

A. No.

Q. From the standpoint of prices at which such bananas could be sold, would it make any difference whether they arrived at Philadelphia, or New York?

A. No.

Q. Has it been your experience that the market price for bananas in Philadelphia is the same, or approximates the prices realized in New York?

A. I believe they are the same.

\* \* \* \* \*

[fol. 319] Q. At the present time, Mr. Meyer, can you sell for Mr. Consolo's account, up to an additional 14,000 stems a week?

A. Oh, yes.

Q. At what prices?

A. Well, at the market price.

Q. At all times since October 19, 1957 which, I believe, is the date of the first shipment you handled for Mr. Consolo—

A. (Interrupting) October 21st.

Q. October 21, 1957.

A. Yes.

Q. Could you have handled up to an additional 14,000 stems of bananas for Mr. Consolo's account?

A. Yes, I did prior to October 21st. The previous week I had 40,000.

Q. Could you have sold such bananas at the prevailing market prices?

A. That's right.

Q. Could you have also sold an additional 5,000 stems of bananas each week if such bananas had arrived at Philadelphia at all times since October 21, 1957?

A. Yes.

Q. At the same market prices which prevailed at New York?

A. Yes.

\* \* \* \* \*

## Cross examination.

By Mr. Giallorenzi:

Q. You testified, Mr. Meyer, that it really did not make any difference price-wise, or otherwise whether bananas came into New York, or Philadelphia, except that the local purchaser, or consumers of bananas in New York—

A. (Interrupting) They do.

Q. (Continuing) —would prefer—

A. (Interrupting) —they do prefer the local trade, do prefer.

MAXWELL BOYARSKY having been first duly sworn, testified as follows:

## Direct examination.

By Mr. Kharasch:

Q. Mr. Boyarsky, will you state your address for the record?

A. 1737 H Street, Northwest, Washington, D.C.

[fol. 320] Q. What is your occupation, Mr. Boyarsky?

A. Certified Public Accountant.

Q. How long have you been a Certified Public Accountant?

A. Approximately seven years.

Q. Is that in Washington?

A. In Washington, that's right.

Q. Are you regularly employed as a member of some company's staff, or are you independent?

A. No, I have an independent Certified Public Accountant firm.

Q. Are you a member of any professional societies?

A. Yes. I am a member of the American Institute of Certified Public Accountants. I am a member of the District of Columbia Society of Certified Public Accountants.

Q. Will you look at Exhibit 24 which has been identified as on Page 1 a loading sheet, for shipment No. 34, Santa Olivia, Page 2, an outturn sheet, and Page 3, liquidation sheet. Are you familiar with a long series of these documents?

A. Yes, I am.

Q. Let's turn our attention, please, to Mr. Friedlander's testimony as to unloading costs in Philadelphia. I would like to know, Mr. Boyarsky, how much per stem it costs to unload the 9,374 stems of Pan-Ecuador Company's fruit, and I want you to exclude from your computation, please, any costs which are already reflected on Page 3 of Exhibit 24. In other words, for example, if Mr. Friedlander provided us with a figure for weight, and you find on Page 3 of Exhibit 24, a figure for weighing which already appears, please exclude that cost in computing unloading costs per stem.

A. I made a computation based on the number of stems, and the shipment that Mr. Friedlander described, and the cost which Mr. Friedlander outlined. I arrived at a figure of 35.15 cents per stem.

\* \* \* \* \*

Q. Mr. Boyarsky, let me read you the two sentences from the case of New Mexico ex rel. McLane v. Denver & Argo Co., 203 U.S. 381, or rather 203 U.S. 38.

\* \* \* \* \*

[fol. 321] Q. I am about to quote, Mr. Boyarsky: "At common law, a cause of action arose from the refusal of a common carrier to transport goods duly tendered for carriage. Ordinarily the measure of damages in such cases is the difference between the value of the goods at the point of tender, and their value at their proposed destination, less the cost of carriage."

Question: Was that measure of damages the measuring stick for damages which you were asked to assume?

A. That is correct.

\* \* \* \* \*

Hearing Room 818  
November 13, 1958  
45 Broadway  
New York, N.Y.

Q. Let's turn to Exhibit 42, please. And before we go into the reasons for the various calculations, let's get in the record for each column exactly where the information comes from and how the figure was obtained. Now, on Exhibit 42, the column at the very far left is labeled "Index." What are those numbers?

A. These are numbers which I used to reference the various sailings as located on my summary sheet.

Q. They were simply assigned numbers serially to each of these sailings?

A. That's right.

Q. Now, the sailings, the voyage number and the ship names, which we see in columns 1 and 2, are ships of what carrier?

A. Grancolombiana Lines.

Q. And have you entered a voyage number and a ship name in chronological order?

A. That's right.

Q. For all Grancolombiana sailings?

A. That's correct.

Q. And the period is November 5, 1955, taking the sailing date from, let's say through September 1958—actually we have some figures for October.

A. We have some for October but we didn't have all the information on them. It runs through September 25, as far as having all the complete information.

[fol. 322] A. In column 10 I have the stevedoring taken at a 35% per stem charge applied to the number of stems shipped on the Grancolombiana sailing, which is shown in column 5 and then I multiplied column 5 by that 35¢ rate.

Q. Where did you get the 35¢ figure for preparation of this column?



A. I was given that figure. It was my understanding that the cost of stevedoring in Philadelphia was discussed with other people, and I felt that this would be approximate cost of stevedoring in Philadelphia.

Q. At the beginning of your testimony yesterday, I asked you to go through some of Mr. Friedlander's figures, and would you state again the computed stevedoring in Philadelphia?

A. Well, I took the figures that Mr. Friedlander had listed when he appeared at this hearing, and I came up with a figure of 35.15¢ per stem.

Q. Or quite close to your 35¢?

A. That's right.

. . . . .

Q. All right. Now, would you state again so we can proceed, how you computed column 10?

A. Column 10 is the total stevedoring cost at 35¢ per stem for the number of stems aboard the Grancolombiana vessel, which is shown in column 5.

Q. And how about column 11, Mr. Boyarsky?

A. Column 11 is the total stevedoring cost for the number of stems shipped on the Grancolombiana vessel at 48.8¢ per stem.

Q. And that 48.8¢ per stem represents what?

A. It's an actual Consolo expense in New York for stevedoring.

Q. At the twelve dollars and a half-cent per ton?

A. Twelve dollars and a half-cent per ton.

Q. So, as I understand, your columns 10 and 11 are alternate calculations at different assumptions of stevedoring?

A. That's right.

Q. Now, having had the benefit of hearing Mr. Friedlander, are you prepared to choose an actual rather than assumed stevedoring rate?

A. Well, on the basis of the figures detailed by Mr. Friedlander, I could use a 35.15¢ per stem cost instead of the figure in column 10 for the cost in Philadelphia.

[fol. 323] Q. Now, what appears in column 12, Mr. Boyarsky?

A. Column 12 shows the net profit at a 35¢ stevedoring cost and that figure would be column 9, which is the total profit before stevedoring and freight, which I described previously, less the freight paid to Grancolombiana as listed on the document which was submitted to me, and less the stevedoring which is shown in column 10 at my assumed rate of 35¢ per stem.

. . . . .

By Mr. Giallorenzi:

Q. Well, now, tell us what instructions you received from Mr. Kharasch the first time you were retained in this matter?

A. Mr. Kharasch called me and said he would like to discuss a matter with me which would involve use of myself and my staff from the accounting point of view. I discussed with him the problem. He indicated to me that the problem was to ascertain what the amount of damages would be sustained by an individual based on certain information. He then presented to me the documents which I previously mentioned to you; the loading sheets; the outturn sheets; the liquidation sheets; the cards that you see here, the Grancolombiana cards, the other supplementary data which we discussed. He said this is the information which we have. "We are trying to determine what, if any, are or would be the damages sustained by Mr. Consolo as a result of having been refused shipping space on Grancolombiana ships." Now, with that preface, we then went into the documents, discussed the meaning of the documents. I posed certain questions to Mr. Kharasch; Mr. Lippman was in on the conferences; I posed certain questions to him. We talked about those points which were not clear or which needed additional clarification and then I sat down and set up preliminary worksheets to try to get at the information from the documents which I had. I discussed the setting up of the worksheets, which I have right here, with both Mr. Kharasch and Mr. Lippman. I want to emphasize that nobody told me what to do or how to go about this. I was given certain information. I was told of a problem and I was asked to use [fol. 324] my accounting ability to develop this information

in a clear mathematical manner, and that is what I tried to do.

Hearing Room 3553  
New GAO Building  
Washington, D.C.  
Friday, November 21, 1958

JOSE J. BORRERO was recalled, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Borrero, you have been previously sworn in and you have testified that you are or have been the Acting General Manager of Transportadora Grancolombiana, LTDA., the General Agent in the United States of Flota Mercante Grancolombiana and that you are now the Executive Vice President of Grancolombiana, N.Y., Inc., which is the general agent in the United States and Canada for Flota Mercante; is that correct?

A. Yes, that is correct.

[fol. 330]

Hearing Room 4519  
New GAO Building  
Washington, D.C.  
Tuesday, December 2, 1958

Mr. Rosenzweig: Before I begin with Mr. Friedlander, I would like to ask, Mr. Examiner, if you will take official notice of the Grace form contract which Grace employs in connection with the carriage of bananas for the shippers of bananas on the Grace Line, copies of which contracts are in accordance with the Board's order in the Grace Line's cases on file with the Board.

[fol. 331] Mr. Lippman: We already have in evidence, Mr. Rosenzweig, copy of the Consolo contract.

Mr. Rosenzweig: Yes. If you will just agree with me that the Consolo contract, except as to the terms of space and naturally the hire because of the difference in space, is the same as every other contract—

Mr. Lippman: I couldn't make that stipulation because I just don't know.

Mr. Blackwell: I was wondering, Mr. Rosenzweig, at what particular date would this official notice take effect?

Now, I am not sure that the order in the Grace Line case requires the carrier to submit every contract that it has ever entered with an individual shipper since the time of the decision and, as I understand it, some additional space has been allotted and contracts may have been changed, and those contracts may never have been filed with the Board.

Mr. Rosenzweig: I think the Board's order, Mr. Blackwell, requires the file or copy of each contract to be entered into with shippers.

Well, may I request then, that the Examiner take official notice of the contracts which are on file with the Board.

Mr. Blackwell: Fine.

Examiner Robinson: I think I can give you a little information on whether the newer contracts—you know, the people who got extended space, in this letter from Grace Line to the Secretary October 21, 1958, in which he states the names of the existing shippers who are no longer with him and the space has been given to others. It says:

"The additional space has been provided on the same basic terms and conditions as contained in the contracts heretofore filed with the Board. The new space allotments and operational factors has resulted in changes in vessel compartments provided certain shippers."

Mr. Blackwell: That takes care of my question.

Examiner Robinson: Why don't you just say the parties have no objection to letting me and the Board take cognizance of them? That will eliminate any question.

Mr. Dougherty: We certainly have no objection.

Mr. Lippman: No objection.

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[fol. 332]

## BEFORE THE FEDERAL MARITIME BOARD

Transcript of Proceedings—(Excerpts)—May 9, 1960

Room 705

45 Broadway, New York, N.Y.

. . . . .

Mr. Giallorenzi: We are ready to proceed, Mr. Examiner.

. . . . .

Mr. Giallorenzi: Mr. Examiner, I would like to make a statement before any evidence is introduced.

. . . . .

(Mr. Giallorenzi:)

I therefore request that since the reparations period encompassed by the complaint and the supplemental complaint is from July 1955 to September 1951, that we have available at the time we intend to cross examine Mr. Consolo on the complaint the following documents for those years: the tax returns, profit-loss statements and balance sheets of Mr. Consolo, the Dover Banana Company, which you recall was the shipper on the Grace Line freight which had been assigned to Mr. Consolo, Darien Shipping & Trading Company, which he admitted was a Panamanian corporation which purchased the fruit from Ecuador Fruit Company, an Ecuadorian company, because, as I recall, the testimony was that the chain of the transaction here was the Ecuador Fruit Company would buy in Ecuador and would sell it to the Darien Shipping and Panamanian Company, and then, Dock Banana, in which Mr. Consolo was a minority stockholder, stepped into the picture and took over his space. In addition to that, in 1957, when the space came up for renewal, Grancolumbia addressed Atlantic Fruit & Shipping Company, one of Mr. Consolo's corporations.

And since this is the time for which they are seeking to recover substantial sums from Grancolombiana, I would like to press with all the vigor that I have at my command, the request that those documents be made available to us.

Mr. Kharasch: Mr. Examiner, I would like to note one thing. At the last hearing, there was an explicit offer on the record to accommodate any Grancolombiana witness on the subject of reparations that was then available, both by [fol. 333] myself and by Mr. Kurrus who was then here.

As to the document, if you will give me two minutes, I will find in the record your explicit ruling on the same request made at the last hearing, and I think my comment might be a little more pointed if you will suspend for two minutes, and I will find it in the record.

Examiner Robinson: Go ahead.

Mr. Giallorenzi: Yes, Mr. Examiner, I did ask for the [profit and loss] statements on two occasions, and those statements for Mr. Consolo that you expressly denied my request for. But I am renewing it now, because at this particular time of the proceedings we are directly involved with reparations.

I do not think it is necessary for Mr. Kharasch to look through the record. I concede that you denied my request on two occasions, but despite that denial, I again press my request, because I feel that this is the proper time that we must see these documents in view of the enormity of the demands which they are making against Grancolombiana.

Examiner Robinson: Does anyone have any recollection? I frankly don't.

Did I give a specific reason for it, or did I give a categorical denial?

Mr. Giallorenzi: On my second request, you said, "I expressly deny it", pretty emphatically.

Examiner Robinson: Did I give any reasons for that?

Mr. Giallorenzi: No, just the denial.

Mr. Kharasch: There was a denial, as Mr. Dougherty points out, at Page 828 of the record, and there was some discussion ahead of it, which I haven't yet found. To refresh your recollection, Mr. Examiner, this identical demand arose when Mr. Boyarsky had put in his computations based on evidence of the cost of bananas in Ecuador and evidence of the sales price of bananas in the United States.

And, as we explained at some length in the previous portion of this hearing, we used records available to Mr. Consolo to show banana sales prices in the United States with which we were concerned on our theory of damages, showing [fol. 334] the difference of the market price in the United States and the market price in Ecuador, less freight and stevedoring charges on Grancolombiana—that is, our claim is based on Grancolombiana's exclusion.

The Grace Line profit or loss is completely immaterial because Grace Line freight is not involved. Grace Line stevedoring is not involved.

You will recall that when we had a purchase price for a certain date in Ecuador and the corresponding sales price for some ten or twelve days later in the United States, we used those evidences of the market and applied them to each Grancolombiana sale during the reparations period.

And when, for example, if we had a Grancolombiana sailing, let us say, on the 30th day of June, we look for the closest evidence of the purchase market in Ecuador and then we look also for the closest evidence of the selling market in New York, in order to establish what the damage would have been if bananas had been shipped, had been able to have shipped with Grancolombiana, as Mr. Consolo explained at that time.

I think we went around and around a couple of times on the argument. This is not a case against the Grace Line. The Grace Line figures are used as evidence of market and the personal financial data that Grancolombiana is seeking has absolutely nothing to do with the state of the market in Ecuador on the date of the shipment, or the state of the market in New York on the date of arrival.

\* \* \* \* \*

Examiner Robinson: At the moment, I would just limit it to the method on which we already were proceeding, and I will think about this thing, and I don't want to prejudice you at all and I will give you plenty of time to get it if I finally decide to change my mind.

We will stick by the way we were going, but you are not going to be precluded, because I certainly think you are entitled to every consideration I can give you.

Mr. Giallorenzi: It is clear to my mind that you have deferred your ruling on my request. There is no ruling on the record?

Examiner Robinson: That is right. If I make up my mind later on, I will be glad to change it.

[fol. 335] MAX BOYARSKY was recalled as a witness and having been previously duly sworn was examined and testified as follows:

Direct examination.

By Mr. Kharasch:

Q. Mr. Boyarsky, Exhibit 110 is a list of Grancolombiana arrival dates, tons outturn, cost and cost per ton.

Were these figures supplied to you by Mr. Consolo through our office?

A. Yes, they were.

Q. Did you use the average figure of \$12.41 per ton, appearing at the bottom of the page, as a figure for stevedoring and computing damages in the exhibit itself?

A. That is correct.

Q. And in column (10), what figures do you show?

A. The total stevedoring at \$4.51 per stem—excuse me—at \$.451 per stem.

Q. Will you explain, please, where you obtained the figure of \$.451 per stem?

A. We calculated that on the basis of the average stevedoring cost per ton. We referred to Exhibit 110, which shows the calculation.

Q. And how did you refer it to tons and stems?

A. From the basis of a differentiation to arrive at cost per pound and apply that to the average weight per stem.

Mr. Giallorenzi: What did you use, short tons or long tons?

The Witness: Two thousand pounds for tons.



Q. Mr. Boyarsky, at the earlier hearing you prepared interest computations, which was marked as Exhibit 44.

Would you tell us whether you have made a similar computation for this hearing?

A. No, I have not.

Q. Why not?

A. Because I felt that that computation could be arrived at very quickly when I knew the exact dates which would be used, because I think this would continue to run on the damages until the date of settlement was arrived at.

[fol. 336] Q. In other words, the earlier interest exhibit is not much good to us, because it represents interest up to a date already passed?

A. That is right.

Q. Would it be a simple accounting job to compute the interest rate?

A. Yes, it would be a simple process.

Q. As soon as you have the date which is the cut-off date, you mean?

A. That is right.

\* \* \* \* \*

Mr. Kharasch: Mr. Meyer, will you take the stand, please.

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LOUIS F. MEYER was called as a witness, and having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Kharasch:

Q. Mr. Meyer, you testified at the last hearing in this case?

A. Yes.

Q. I would like to begin, while Mr. Boyarsky is still in the room, by placing before you a file which contains certain documents labeled "Cargo Out-Turn Sheets," and certain

documents that have been referred to as "Liquidation Sheets."

A. This is it.

Mr. Kharasch: Mr. Boyarsky, will you come a little closer to the stand, so you can see these documents as Mr. Meyer testifies.

By Mr. Kharasch:

Q. Mr. Meyer, were these out-turn sheets which I am showing you, covering voyages between October 21, 1957 and October 30, 1958, in this file, prepared by R. Dixon & Co.?

A. That is right.

Q. Were the liquidation sheets prepared by R. Dixon & Co.?

A. That is right.

Q. Do the out-turn sheets and the liquidation sheets accurately reflect the selling price received for this group of bananas?

A. That is right.

Q. Will you look through the entire file, on both sides, and see if you recognize all the documents as documents prepared by your company?

A. Yes. I will testify to that. That is correct.

• • • • •

[fol. 337] SHILLO ADIR was called as a witness, and having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kharasch:

Mr. Kharasch: Mr. Boyarsky, will you again watch as I show these files to Mr. Adir.

Mr. Boyarsky: Yes.

By Mr. Kharasch:

Q. Mr. Adir, will you look at the cargo out-turn sheets for October 15, 1957 and earlier, also the liquidation sheets? Would you examine the file and state whether those out-turns and liquidations were prepared by your company?

A. That is correct. They were.

\* \* \* \* \*

LOUIS F. MEYER resumed and testified further as follows:

Direct examination.

By Mr. Lippman:

Q. Mr. Meyer, you have previously testified in this proceeding, I believe in November of 1958?

A. That is right.

Q. Do you recall, sir?

A. Yes.

Q. And you testified at that time that your company, R. Dixon & Co., was acting as commission agent for the sale of the bananas imported by Mr. Consolo on the Grace Line, is that correct?

A. Correct.

\* \* \* \* \*

Q. Now, during the period of November 1958 up to September of 1959, could you have sold for Mr. Consolo's account up to an additional ten to twelve thousand stems each week?

A. Definitely.

Q. And at what prices could that amount of bananas have been sold?

Mr. Giallorenzi: I object to this. This is very, very speculative, what prices they would be sold at, because certainly 12,500 additional stems in the market might mean a downward trend in the prices. It depends upon what the [fol. 338] other fruit companies were bringing in, what the conditions of the market itself was here, how many bananas were being exported by the other companies; and I don't

think that Mr. Meyer, with all his experience in the banana business, is that good a witness.

Examiner Robinson: You may cross examine him in due time and try to bring out any weaknesses which you hope to find. There is nothing wrong with the inquiry.

Examiner Robinson: You may answer the question.

The Witness: Repeat the question, please.

(The last question was read by the reporter.)

The Witness: The current market prices prevailing at that time.

Cross examination.

By Mr. Dougherty:

Q. What is your best recollection? Did you, from October 1957, send your liquidation statements to Dover Banana Company or to Philip R. Consolo?

A. I sent them to whomever the accountings were made. I think it is Dover Banana.

Q. You think it is Dover Banana?

A. That is right.

Q. You wouldn't want to verify that by going over all your statements?

A. I will if I have to. Why not? It's no secret about it.

Q. That is right. There is no secret about it.

A. There is not, not as far as I am concerned.

Q. So your best recollection is that all your statements were sent to Dover Banana Company?

A. That is right.

Q. How long have you been engaged in and acting as selling agent for Mr. Consolo or any of the companies that he or his brother may have controlled?

A. I think from October '57.

Examiner Robinson: '27?

The Witness: 1957—to July of 1959.

\* \* \* \* \*

[fol. 339] By Mr. Dougherty:

Q. After July of 1959, did you sell any bananas for the Consolo Brothers or any of the companies which they controlled?

A. Yes.

Q. You are still selling bananas for them, is that right?

A. That is right.

Q. In other words, Mr. Consolo or his brother or any of the companies they have are customers of yours, is that correct, Mr. Meyer?

A. No. Banana Distributors, I think is handling Consolo's bananas. They had some arrangement, I think, with Mr. Noboa.

Q. Well, at the present time, do you participate in the sales as a commission agent of any of Consolo's bananas?

A. That is right.

Q. You do?

A. Yes.

Q. Do you sell them under the firm name of R. Dixon & Co.?

A. No; Continental Banana Company.

Q. Continental Banana Company?

A. That is a selling agency.

Q. Are you a shareholder of that company?

A. No.

Q. Are you an officer of that company?

A. Yes.

Q. So you participate financially in the sale of the Consolo bananas?

A. That is right.

Q. Now, you requested space from Grancolombiana, through your attorney, Mr. Susskind, isn't that right?

A. That is right.

Q. And did you receive any space from them?

A. I didn't follow that up. I didn't take the space.

Q. But you made a request for it?

A. That is right.

Q. Now, do you recall the time that you last testified at these hearings—I will withdraw that.

Do you know who else Continental Banana Company distributes for?

A. Yes.

Q. Will you please tell us?

A. Andes Fruit & Produce Company, Banana Distributors, and R. Dixon & Co.

Q. And R. Dixon & Co.?

A. That is right.

Q. Are you an importer now of bananas?

A. No.

[fol. 340] Q. You are still a commission merchant?

A. That is right.

Q. Continental sells for you?

A. That is right.

\* \* \* \* \*

SHILLO ADIR resumed and testified further as follows:

Direct examination.

By Mr. Kharasch:

\* \* \* \* \*

Q. Following the period of 1959, when National Banana, acting as agents for bananas shipped from Ecuador by Mr. Consolo, sold the bananas, what company then took over this business?

A. After National Banana?

Q. Yes, sir.

A. Continental Fruit Company.

Q. And Continental Fruit—would you just briefly describe what your connection is with them?

A. I am an officer and a stockholder of Continental Fruit.

What basically happened, there were three companies selling bananas of various shippers of the Grace and Chilean

Lines. These shippers were represented by Andes Fruit & Produce, others by R. Dixon, others by Banana Distributors, and in some cases, a shipper had two agents representing him.

Noboa had Andes Fruit distributing some of his fruit and Banana Distributors the balance, at that time, National Banana.

National Banana and Andes Fruit decided that it would be better, more efficient, to operate as one company. Therefore, Continental Fruit Company assumed the distribution for these three distributors in effect—actually two, because National Banana was already doing the work that had been done previously by Banana Distributors and R. Dixon.

So Continental Fruit began the sale of all the bananas on the Grace Line, except for one chamber, or three-quarters of one chamber that is sold by a company called West Indies.

All the bananas on the Chilean Line and all the bananas on the Grancolombiana Line.

[fol. 341] Q. That is subsequent—

A. That is after they started the shipments.

Q. Now, looking for example, at a sailing, which I believe is sailing 104, and looking at your liquidation sheet there, I see that—well, I see a gross sales figure which is broken down among Dover Banana and Banana Distributors and Noboa; is that right?

A. Yes.

Q. What does that indicate as to the way you are handling fruit?

A. These three companies are in a venture, insofar as the total bananas imported by these three companies on this particular liquidation are sold as one unit, are weighed as one unit, proceeds divided according to the percentage, and the percentages were based, if my memory is right, more or less on the cubic space held by the specific companies.

Mr. Giallorenzi: What is the date of that statement you are reading from?

The Witness: September 15, 1959.

Mr. Dougherty: And who are the joint venturers?

The Witness: This is Grace Line.

Mr. Dougherty: Who are the three shippers?

The Witness: Dover Banana Company, Noboa, and Banana Distributors.

By Mr. Kharasch:

Q. Now, do I understand that all of the bananas arrive, and all of the bananas are sold to the various customers—then the proceeds are split; is that right?

A. Yes. Continental did the selling, but not as distributors. The distributors, in turn, had clients; one, in turn, was Banana Distributors and [we] had vessels including the Grancolombiana Line, depending on space that the person was assigned.

Q. As to the selling price, you pool all the bananas?

A. All the proceeds of these 16,937 stems were pooled. The expenses against them are pooled. The net amount after payment of freight and stevedoring and commissions and a few other expenses were divided according to the percentage of this particular venture.

[fol. 342] Q. Do you find that this new method of selling had certain deficiencies or advantages over previous—

• • • • •

Mr. Dougherty: As I understand it, Continental Fruit Company began operations in 1959?

The Witness: That is right. And I said this fruit is sold by Continental.

Mr. Dougherty: How does that bear on the exhibits which go up to, but not beyond that date?

Mr. Kharasch: Continental started September 8th. This entry is September 15th.

• • • • •

By Mr. Kharasch:

Q. Would selling an additional 10,000 stems a week arriving in Philadelphia on Grancolombiana ships, in the period of October 1958 to October 1959, have affected the market price?



A. We have shown that the more bananas that are sold—we haven't reached the optimum yet—the better average per sale received, because you have strength [in the] trade. You trade as a large seller of bananas and they depend on you because they know you can reach large quantities. You are able to [deal with] the trade [and] you are [not] limited to small units as Continental. [Suppose] all you have is 250 cars a week and a large customer says, "I want 500 cars," so the more fruit you bring in or the more fruit you get for sale, the better and stronger you become as a selling agent.

. . . . .  
Hearing Room 705, 7th Floor  
45 Broadway, New York, N.Y.  
May 10, 1960—10:00 a.m.  
. . . . .

PHILIP R. CONSOLO having been previously sworn, testified as follows:

Direct examination.

By Mr. Kharasch:

[fol. 343]                      Cross examination.

By Mr. Giallorenzi:

Q. That is all we are concerned with, the independents.

A. As far as the independents are concerned, I don't know of anyone who has sort of slacked off while the bad market has been here or has increased with the good market. There seems to be a very constant supply of bananas from Ecuador into the same market, [what it] amounts to, [to] the best of my knowledge, [is] that who[ever] has space in Grancolombiana or Grace Line, has to ship whether the market is good or bad. There may be some fluctuation in

the market when it is good or bad on independent ships doing spot business while the market is good.

Q. Who do you buy your bananas from now?

A. In which company are you referring to?

Q. I don't know how many companies you have. We will get to that later.

A. Right now I buy bananas on the Grace Line and the Grancolombiana Line from Mr. Noboa on my ships and I bought from my own office, Ecuador Fruit Company.

Q. Isn't it a fact that you had to buy your bananas, part of your shipments for Florida ports, because there were no other sources of supply available to you and that is why you have to buy from him?

A. That is incorrect.

Q. Are you sure about that?

A. Yes, sir.

Q. At our last hearing you had introduced into evidence or there was introduced into evidence as Exhibit 31 a contract with Plantaciones Ecuatorianas and signed on your behalf, Ecuador Fruit Company, by Mr. Nebel for 3,000 stems, is that correct?

A. I would have to look at it to refresh my mind.

Q. Here it is.

A. I think that is correct.

Q. In other words, you have firmly committed to you only 3,000 bananas, is that right?

A. You mean on the written contract?

Q. Yes.

A. That is correct.

[fol. 344] Q. You didn't know how much you would get on an unwritten contract because that depended upon the condition?

A. I wouldn't say that.

Q. Why not?

A. Because there was an availability of bananas in Ecuador and it was just the ability to go out and make contact with farmers or producers to meet whatever requirements you needed.

Q. You are sure that you could have met any reasonable requirements?

Mr. Kharasch: What do you mean by "reasonable requirements"?

By Mr. Giallorenzi:

Q. 12,500 stems a week.

A. I think we could have.

Q. Could you give us some of the names of the suppliers?

A. We go out in the open market when we need fruit and contact whoever has bananas to sell them.

Q. So again it depends upon whoever has bananas to sell them?

A. There never seems to be a shortage of bananas in Ecuador.

Q. In other words, it has been your experience that there has never been a shortage in bananas from or in Ecuador?

A. We seem to get as much as we need. Recently we loaded as high as 60,000 stems in the south.

Q. That is quality bananas?

A. Yes, quality bananas sold in the market.

Q. Would you say the same conditions would apply in 1955, '56, '57 and '58? You could have loaded that many bananas, quality bananas?

A. I don't know. I can't answer that. I didn't try.

Q. You didn't try?

A. No. I didn't.

Q. When you were negotiating, at least so you say in your complaint, that space was denied to you from November 1955 from Grancolombiana, and you still didn't know whether you could obtain the bananas?

A. You asked me in amounts of 50,000. If you asked me in amounts of 5 or 10,000 or 15,000 or 20,000, I don't think we had any trouble in obtaining that amount of bananas.

Q. Did you have any written contracts then?

A. No.

Q. Do you recall the testimony of your employee, Mr. Nebel, who said that it is preferable to have written contracts?

A. Yes. It would be the easier course to have written contracts.

[fol. 345] Q. As I recall, you disagreed with him at the time. Do you still disagree with him?

A. Yes.

Q. He is still your manager?

A. Yes.

• • • • •  
Cross examination (Continued).

By Mr. Giallorenzi:

• • • • •  
Mr. Giallorenzi: There is a pending motion, Mr. Examiner, for the tax returns, credit slips and balance sheet of Mr. Consolo. We are anxious to get at the bottom of who, if any, was aggrieved to this action by Grancolombiana and it appears that all Mr. Consolo has done to this date, today, [was] write a letter and say, I want some space and I will pay you Y number of dollars. I think at this particular time we should be able to inquire as to the workings of this corporation and of these various corporations which he had. I think we also should be able to inquire as to what his income was during these years, how he obtained it and matters relating to that because we have two problems here, did he suffer the damages personally or were there some corporations that he controlled that would suffer these damages, and frankly I'd like to get at the bottom of it. I think that this line of inquiry is very, very relative.

Examiner Robinson: Under reparation proceedings, the only person of concern that I am interested in and the Board is interested in is the direct person involved; under the various interpretations of damages [by the] agency, I think Mr. Dougherty pointed that out quite vigorously in another proceeding.

• • • • •  
Examiner Robinson: The only thing I can do is, you have the original figures here which shows what would have happened had he been able to ship by that means. But I don't

think we should go beyond Mr. Consolo. I know how you feel about it and I am sympathetic with you but as far as I am concerned, I don't think I can let you go beyond Mr. Consolo unless you show some fraud, of which there was no indication here, [unless it] was so obvious, I couldn't close my eyes to it.

[fol. 346] Mr. Dougherty: Mr. Examiner, are you saying we are not at liberty to inquire into Mr. Consolo's deals?

Examiner Robinson: You have inquired. He is the complainant. He makes the complaint. All I understand if I had the opportunity to use that space, I could have done it. What he does after that, as so frequently happens in these proceedings between Grace and Grancolombiana, there is a shifting of party shippers right and left. I could have shipped some bananas during that time. My damage would have been so and so. My profit would have been so and so. Now, whether or not he has proved that or anything, that is something else. I don't agree to going any farther than that.

Mr. Dougherty: We cannot then inquire into the operations of all of these corporations the evidence has shown are the ones involved.

Examiner Robinson: I don't think so, Mr. Dougherty, and you are not going to be too bad off even if I am wrong. I don't think I am wrong. I am trying to look at it from a long range point of view. Undoubtedly this thing will be decided by me on the reparation period long before the Court of Appeals in the District of Columbia decides on the merits of your case. In the meantime, you are not going to be prejudiced in the long run. It is the best I can do for you.

Mr. Giallorenzi: Just so that we will have the record clear. As I understand it then, your ruling is that we are not entitled to view and you are not directing Mr. Consolo to produce his personal income tax returns for the years 1955, 1956, 1957, 1958 and 1959?

Examiner Robinson: No.

Mr. Giallorenzi: Nor are you directing him to produce his profit and loss or balance sheets for the same years?

Examiner Robinson: I have been thinking along that ever since we talked about that yesterday. I would not grant that.

Mr. Giallorenzi: In other words, our requests for those three documents, income tax returns, profit and loss and balance sheets of Mr. Consolo personally from 1955 through 1959, are denied by you?

[fol. 347] Examiner Robinson: That's right.

• • • • •  
By Mr. Giallorenzi:

Q. Now Mr. Consolo, referring to Exhibit 25 which deals with the request for space on Grancolombiana vessels. Did you at any time personally make any efforts to obtain bananas or did you make any efforts in connection with the projected shipments which you would have made on the Grancolombiana vessels, whether in 1955 or 1957, if your bid had been accepted?

A. All I did was correspond with Ecuador or Pacific Fruit Company, whatever the year may have been, and said, be on the alert, if we do get space, to secure additional 5 or 10 thousand stems of bananas; and he probably spoke to farmers or producers, Mr. Nebel. What he did, I don't know; and seemed to say there would be no problem to get an additional 5 or 10 thousand stems.

Q. Do you have those letters with you?

A. No. I don't.

Q. Do you recall any reply from him?

A. We have correspondence with Mr. Nebel. I don't know where that correspondence is now.

Q. Did you, at any time, actually tell Grancolombiana that you were prepared to tender shipments on their vessels?

A. No. I did not.

• • • • •

WILLIAM FANELLE having been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Fanelle, by whom are you employed now?

A. Grancolombiana Incorporated, New York.

Q. And prior to being employed by Grancolombiana New York Inc., were you employed by Transportadora Limitada Columbia?

A. Yes.

Q. For how long a period of time were you employed by both Transportadora Limitada or Grancolombiana New York Inc.?

A. About 10 years.

Mr. Giallorenzi: Off the record.

(Discussion off the record at this point.)

\* \* \* \* \*

[fol. 348] By Mr. Giallorenzi:

Q. Now, will you kindly describe to us what your functions or duties are in the chartering department of Grancolombiana New York Inc. and its predecessor?

A. Well, as a liner company we are always in the market for chartering of vessels and it is my duty to keep in touch with the market to see what vessels are available; also to see what vessels would suit us; check the market for cargos and start negotiations for any particular vessels or cargo which we might be interested in.

\* \* \* \* \*

Q. Now, when you say you keep in touch with the market for the purpose of seeing what tonnage is available for Grancolombiana to charter, will you describe the method by which you keep in touch with the market?

A. Well, most brokerage houses, chartering brokers in most cases—I get a call from each chartering broker every day and every so often they put out a circular listing the

offerings of vessels on the market and with that of course we keep abreast of what the market is like. We get a market report every Monday as to the vessels which are fixed and every brokerage house as a rule, I call them brokerage house, actually it is chartering brokers—as a rule issue an offering list every day or every two days and so and with that—in other words, if the company decides they need various type of ship, I can go to my files and find out if there is a ship in that position, type of ship we want money-wise and so.

Q. How many brokers would you say you are in communication with on an average during the year, with reference to the chartering of tonnage?

A. During the year?

Q. Yes.

A. About 40 roughly. I can visualize my telephone list. I would say 40.

\* \* \* \* \*

Q. Did you receive from 1955 on circulars from various chartering brokerage houses as to what reefer tonnage, if any, was available for charter?

A. Yes, sure.

\* \* \* \* \*

[fol. 349] Q. Now, prior to coming here today, did I ask you to look through your records with reference to reefer tonnage and see what tonnage was being offered by owners for charter from 1955 on, about the center of 1955 on—limiting yourself to vessels about 50,000 cubic feet?

A. Yes, sir.

\* \* \* \* \*

Q. Mr. Fanelle, referring to those records which you said comprise market reports received from various brokers and placed in this folder under your direction by your Secretary. Can you tell us as of 1955 on, summer or middle of 1955, what [reefer] vessels if any were available for charter, limiting your testimony to vessels about 50,000 cubic feet? I think you go from the middle of 1955 to October 1, 1959, that would cover the period. Give us the



dates when they are available and the name, if you have them and any other characteristics that may be there. Take your time in going through. I know you have a lot there.

A. Starting from or in June, did you say?

Q. Around that time, Mr. Fanelle. How far back do the records go?

A. December '55, November, October, August. Here we have some for June.

Q. Just give us the year and the amounts of cubic?

A. June 22, 1955—you said about 50,000?

Q. That's right, 50,000 or in that neighborhood.

A. How about 42,000?

Q. That's right.

A. You want the name of the ship?

Q. If you have it there.

A. The vessel Fedale, about 42,000 cubic feet, 13 knots.

Q. When was it available for hire?

A. September-October of that year; U.S. N.H., interested in three year charter. Do you want the ideas?

Q. No, just the material.

\* \* \* \* \*

Q. Could you tell us whose circular that is?

A. Yes, Winchester.

Q. Is that a large recognized brokerage [house] in New York?

A. Yes.

\* \* \* \* \*

Q. Then there is another ship with 31,783 cubic feet, 14 knot ship. She was opened in August or in September—ship called the Valfrede, for 6 to 12 months time charter. Vessel called the Casablanca; interested up to two to three [fol. 350] years time charter September. This was August 10th, date of circular.

Q. 1955?

A. That's right, sir.

Examiner Robinson: Of what capacity?

The Witness: 50,000.

By Mr. Giallorenzi:

Q. Anything about the speed?

A. 13 knots.

\* \* \* \* \*

A. On November 9, 1955—the same vessel called Valfrede was still open for time charter. They don't give the length of time on there that they want it. They were interested in the delivery on the [other] side.

Mr. Giallorenzi: Off the record.

(Discussion off the record at this point.)

A. On November 16th, the Valfrede looking for business were open again with delivery Puerto Rico in January.

\* \* \* \* \*

A. There were two on April 4th, two new buildings.

Q. What year?

A. April 4, 1956. There were two new buildings. The name of one is Iceberg and the other is Ice Flower, 41,000 cubic feet. They were ready on the Continent.

Q. Could you tell us when?

A. In the middle of '56 and end, respectively. They were new ships, new coming out of the yard.

Q. That is the cubic feet for each ship?

A. That is right, 41,187; speed was 12½ to 13 knots.

Q. Were they offered on a trip basis or time charter?

A. These would only be time charter in this particular case, only [the one] size; ready from yard Continent, middle and end '56, respectively. On May 16, 1956, the vessel Casablanca which I mentioned before—50,000 cubic feet, was open again June 7th, U. S. Atlantic; and ship called Kenidari—253 cubic feet, middle June, Chicago or U. S. Middle Atlantic.

Q. All time charters?

A. Yes, all time charters.

[fol. 351] Q. Do you have anything on the speed of those vessels?

A. No, sir.

Q. Go on.

A. On June 6th, the vessel Kenidari was still open for Great Lakes and U. S. Atlantic; and on June 6th, vessel called Josephine Lanasa—50,000 cubic feet, June 15th, U. S. Gulf or thereafter three weeks, time charter, voyage or sail. 84,000.

Q. Too big.

A. On June 11, the Josephine Lanasa was still open; on June 11th the Kenidari or the Casablanca were open in the Lakes again. On August 3rd, Josephine Lanasa was open in U. S. Gulf. On September 5th, vessel called the Burfin—about 50,000 cubic feet was open in U. S. Gulf for time charter or sale or voyages. October 24th, Berwermair open again.

Examiner Robinson: Let me ask you this.

Do those records show, this may sound like a stupid question because you are in the business all the time. Those figures you have read, are those the full capacity of those ships or just the reefer capacity?

The Witness: That would be the full capacity. This is what they call refrigerated tonnage. That is what they would be selling.

Examiner Robinson: I just want the record to show that there wasn't space for dry cargo.

The Witness: This is a full reefer ship.

By Mr. Giallorenzi:

Q. Those stock bananas or reefer fill?

A. Yes, sir. Incidentally, there are dry cargo ships which will show, for example, 200,000 cubic feet of bail space including 20,000 feet of reefer space.

\* \* \* \* \*

Q. How about '57?

A. Shall I continue?

Q. Yes, go ahead.

A. 38,000 cubic feet.?

Q. Yes.

A. On March 13, 1957, Fisco—about 38,000 cubic feet was ready in the yard of South Finland in July of that year; interested voyages or time charter.

Q. What was the speed, Mr. Fanelle?

A. The vessel apparently was a new one being it was coming out of the yard, it doesn't give that. On April 17, 1957, there were several new buildings. They don't give [fol. 352] the names. They were each 30,000 cubic feet. First one ready May and then the others June and August; interested in long period time charter. Same date, ship called the Mezzada—63,000 cubic feet. That was offered for May of that year in U. S. Atlantic for time charter or voyages. The vessel called the Ice Princess—55,000 cubic feet, ready in July, interested in time charter. A new building that same year, 47,000 cubic feet, ready in European yard in December of that year, that was in '57. Five new buildings, each 45,000 cubic feet; first vessel was ready end of '57; the others during '58, interested time charter for minimum of two years; alternative, might sell one or two or all. May 8, 1957, new building, 47,000 cubic feet, ready for European yard in December. On June 12, 1957, the vessel called the Ice Princess, 55,000 cubic feet was again open on the Continent for July of that year. Also on June 12th, vessel called the Borgund—30,000 cubic feet was open in Eastern Canada for October of that year. August 7, 1957, vessel called Karitind—34,000 cubic feet was open in August for time charter.

And the vessel called the Keridra, 50,000 cubic feet, was open in August or September of that year in Chicago. He was interested in the direction of Continent for time charter. On September 13th, the vessel called the Kare, 47,000 cubic feet; vessel was open in Montevideo in October for 12 months time charter. On September 13th, the Consul Horn—30,000 cubic feet was open in November at Hamburg for time charter or voyage.

\* \* \* \* \*

Q. All of the documents you have testified to are from Winchester or some other reputable brokers?

A. Yes. So far they are Winchester. I have others here.

Q. You didn't make any of those up yourself, did you?

A. No, sir. On December 26th, the vessel Kare was again open at Christobol for January or February of 1958.

Examiner Robinson: I wonder if we couldn't just shorten this by just getting an admission from Mr. Kharasch that there were vessels of this type available without any legal significance at all, just might save you the time.

[fol. 353] Mr. Kharasch: To the extent that Mr. Fanelle is testifying to as to reefer ships offered in Winchester circulars, I am sure he is reading them accurately; whether they are suitable for bananas or [whether would be] economically sound [to use them, I don't know.]

Examiner Robinson: I am not asking you to admit, I just want to know if they are circularized for charter.

Mr. Kharasch: Some of them are not suitable for bananas or economically feasible.

Examiner Robinson: I think [when] you come to cross-examine this gentleman, you [will find he] wouldn't know anything about it except this circular.

Mr. Kharasch: That is why I don't think it proves a thing.

Examiner Robinson: All he is doing now is they are saying there are refrigerated ships available.

Mr. Kharasch: I can certainly admit that he is reading from Winchester Circular.

Examiner Robinson: You go ahead, Mr. Fanelle, I tried.

Mr. Kharasch: I am not trying to be disagreeable. I don't know what it is you want to stipulate.

Mr. Lippman: Can we have a minute, please?

Examiner Robinson: Go ahead.

(Short recess.)

Mr. Kharasch: Mr. Lippman points out that we are perfectly willing to stipulate that these names and ships as being read by Mr. Fanelle was circularized by Winchester; that is really all.

\* \* \* \* \*

The Witness: On August 23, apparently put out of line here, 1956, there is no name. The vessel has 50,000 cubic feet, open U. S. Gulf for one or two years time charter. Another one, 50,000 or rather 50,750 cubic feet, was open in the Continent for time charter. On August 22nd, 1957, a new building, 70,000 cubic feet was open in December of that year for time charter. September 10, 1957, the vessel called the Price Reefer—42,000—make that 42,500 cubic feet, was open in the end of that month. November 1958, [fol. 354] vessel of 59,500 cubic feet was open on the Continent for 12 months time charter. Another vessel of 42,000 cubic feet was open November of that year for time charter. Another one, November 19, 1958.

Mr. Kharasch: November 19, 1958, did you say?

The Witness: That's right, sir. A third vessel of 50,000 cubic feet was also open November for time charter. Another vessel of 48,000 cubic feet. This is all under the heading of November 19th and also opened in November for time charter. A vessel of about 61,000 cubic feet was open in December for time charter. Another vessel of 31,000 cubic feet was also open in December for time charter. Another vessel of 50,000 cubic feet was open in December for time charter.

Mr. Kharasch: You are not giving us the names because they don't appear?

The Witness: That's right. November 11, 1958, the vessel called the Tern—44,600 cubic feet was open in February of '59 for time charter. The vessel called the Frigore of 60,000 cubic feet was open end of November for time charter. The vessel called the Ice Flower of 38,000 cubic feet was open U. S. West Coast delivery this month, that would make it November.

By Mr. Giallorenzi:

Q. November of what year, Mr. Fanelle?

A. 1958.

Q. And the Frigore was also November 1958?

A. Yes. All these that I am reading are 1958. Under the same heading, Claus Horn—47,000 cubic feet was open

in November of that year. A vessel called the Steadt Schlesweig of 31,000 cubic feet was open in December for time charter. A vessel called the Dora Horn of 31,000 cubic feet was open in January of 1959. The vessel Kare of 45,000 cubic feet was again open in November of that year. A vessel called the Lakhish—of 50,000 cubic feet open in November of that year. The vessel Fidela—42,000 cubic feet was open early December of that year. There are some of these that look familiar but they don't have any name.

Q. Will you give us the cubic tonnage?

A. On August 13, 1958, a vessel of about 30,500 cubic feet was open beginning of September for time charter. [fol. 355] Mr. Kharasch: When you say that looks familiar, it might be a vessel that you have already named by name?

The Witness: That's right because of the position; that's the only thing. A vessel of about 50,000 cubic feet was open in September of that year. Two vessels of 60,000 cubic feet each were open in September. A vessel of about 30,000 cubic feet was open in October. March 5, 1959, a vessel of 31,000 cubic feet was open prompt, that would be first part of March for time charter. A vessel of 40,000 cubic feet was open March-April for time charter. Another vessel for 40,000 cubic feet was open in April. Another one with 40,000 cubic feet was open end of April. One with 45,750 cubic feet was also open end of April. A new building of 34,700 cubic feet was ready in the yard end of April of that year. A vessel of 63,000 cubic feet was open end of April for time charter.

Mr. Lippman: Also a new building?

The Witness: No, sir. A vessel of 60,800 cubic feet was open mid-May. A vessel of 52,000 cubic feet was open end of May. A vessel of 40,000 cubic feet was open end of June. On April 30, 1959—vessel called the Hildegard, 61,000—make that 61,800 cubic feet, a new building which opened in May of that year. On August 14, 1959, a vessel of 42,000 cubic feet was open prompt.

By Mr. Giallorenzi:

Q. Up to October 1st.

A. Alright. A vessel of 40,000—rather 40,200 cubic feet was open in August. A vessel of 40,000 cubic feet was open end of August. A vessel of 30,000 cubic feet was open in September. A vessel of 49,000 cubic feet was open in September. A vessel of 31,000 cubic feet was open in September. A vessel of 44,650 cubic feet was open in September. Another vessel of 30,040 cubic feet was open in September. A vessel of 51,500 cubic feet was open in September. A vessel of 57,000 cubic feet was open in September. A vessel of 51,000 cubic feet was open in October. A vessel of 35,000 cubic feet was open in October. A vessel of 59,000 cubic feet was open.

• • • • •

[fol. 356] Cross examination.

By Mr. Kharasch:

Q. Mr. Fanelle, would you say again why you collected these various circulars?

Examiner Robinson: The answer probably is that he was requested.

The Witness: I don't collect them. I just keep them for reference.

By Mr. Kharasch:

Q. Why do you do that?

A. Just so I can know how the market fluctuates throughout the months and years.

Q. Has Grancolombiana chartered any reefer ships?

A. Not to my knowledge.

Q. Why are there letters in this file addressed to Grancolombiana from Chester, Blackburn and Roder, referring to telephone conversations and asking you for an offer? Have you called those people and asked them for an offer on a ship?



A. We probably had an interest from time to time in reefer vessels. I think you will also find some rough notes, copies of charter parties.

Q. In spite of all of the offers you got or all the offerings described in the Winchester circular, your company never chartered any ships?

A. Not to my knowledge.

Q. How many chartered ships of a speed of 13 knots would it take to provide weekly service between Philadelphia and Guayaquil?

A. I don't know.

Q. Do you know the equivalent freight rate, the freight rate per ton of reefer cargo which the charter price on any of these ships would have been equivalent to?

A. No.

Q. Do you know in fact whether these ships were fitted for bananas or suitable to carry bananas?

A. According to the circulars, I would say yes.

Q. Is it not true that your circular on one or two occasions explicitly stated that they were fitted for bananas?

A. That's right.

Q. And on many occasions they did not?

A. That's right.

[fol. 357] Q. Do you know whether or not these ships were fitted with blowers to carry bananas?

Examiner Robinson: Did you say "blowers"?

Mr. Kharasch: Yes.

The Witness: No. I don't.

By Mr. Kharasch:

Q. You just read tonnage of ships. Do you have any idea of the price of those ships?

A. There are some prices.

Q. Often there are not?

A. That's right.

Q. Do you know whether or not, you might be reporting the same ship, the same one described under a name and one time described just as a tonnage?

A. It is possible.

Q. There may be overlapping?

A. It is possible.

Q. Can you give me a general idea what a reefer ship with 50,000 cubic feet would carry?

A. I can't even guess that.

Examiner Robinson: Off the record.

(Discussion off the record at this point).

By Mr. Kharasch:

Q. Do you know as of any of the dates you have testified about, whether it would have been economically feasible to charter any or all of the ships you read and run a weekly service?

Mr. Giallorenzi: I object to that, Mr. Examiner. Mr. Fanelle is not in the banana business. He doesn't know what it cost from time to time.

Examiner Robinson: You can ask him that. If he says no, that is one way to find out the extent of his knowledge.

Mr. Giallorenzi: What is your answer?

The Witness: No. I wouldn't know.

By Mr. Kharasch:

Q. Is it true, Mr. Fanelle, that in this file are specific offers of ships to Grancolombiana?

A. Yes.

Q. It is a little more than just a circular?

A. That's right.

Q. And the Grancolombiana, are you perfectly clear, did not pick up any of those offers?

A. To my knowledge, no.

[fol. 358] Q. Are we agreed, Mr. Fanelle, as to most of the descri[ptions of] ships that you read, you do not know whether those ships were fitted for bananas or not?

Mr. Giallorenzi: If you know. If you don't know, say you don't know.

The Witness: I don't know, sir.

By Mr. Kharasch:

Q. Your answer is you don't know whether they were fitted for bananas or not?

A. That's right.

Q. Mr. Fanelle, is it also possible to ship non-refrigerated cargo on chartered ships?

Examiner Robinson: Do you mean reefer ships?

Mr. Kharasch: No. I am asking Mr. Fanelle now to compare the reefer situation with the non-reefer situation?

Examiner Robinson: That isn't what you said though.

By Mr. Kharasch:

Q. I beg your pardon. I will start all over again. Mr. Fanelle, is it possible for a shipper who has some ordinary dry cargo, let's say bags of coffee, to charter small ships to move coffee?

A. It is possible.

Mr. Giallorenzi: What do you mean by small ships, Mr. Kharasch?

By Mr. Kharasch:

Q. Would you agree, Mr. Fanelle, that ordinary cargo liner would have 500 to 700,000 cubic feet of space, an ordinary dry cargo [liner]?

A. I don't know what you or what ship you are talking about, sir. I can't answer that question.

Q. Please tell me about the Pasco or some of the Indias, the other ships?

A. Unfortunately, there I don't know anything about them. I can tell you nothing about our chartered ships.

Q. What is the capacity of a Liberty ship?

A. 484,000 cubic feet.

Q. And the C-2?

A. I don't know C-2's.

Q. Is it not true that a ship which can carry 50,000 cubic feet of cargo is about the tenth of the capacity of a Liberty ship or a C-2?

[fol. 359] Mr. Giallorenzi: I don't see the relevancy of this line of questioning.

Mr. Kharasch: I suppose I can make the argument perfectly well in the brief. I just wanted to demonstrate through this witness that you can say the same thing about any cargo or ordinary dry cargo on any ship.

Examiner Robinson: Why don't you just argue that then?

Mr. Kharasch: No further questions.

### Redirect examination.

By Mr. Giallorenzi:

Q. Do you keep a record of tankers which are offered by brokers in New York?

A. Yes.

Q. Has Grancolombiana ever chartered a tanker?

A. No, sir.

Q. You keep the records nevertheless?

A. That's right.

Q. These offers which you have received from Winchester?

Examiner Robinson: What is the significance about tankers?

The Witness: The significance is why does he keep records of banana vessels if we don't—

Examiner Robinson: You are just trying to equalize all types of ships.

By Mr. Giallorenzi:

Q. Mr. Fanelle, these market reports which you get from Winchester and others [are] entitled, "Refrigerated tonnage open for charter," isn't that correct?

A. That's right.

• • • • •

ALBERTO SANCHEZ having been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Captain Sanchez, will you briefly describe what your duties are with Flota Mercante Grancolombiana, S. A.?

A. I am the marine engineer and superintendent of the Flota Grancolombiana in New York.

\* \* \* \* \*

Q. I would like, Mr. Examiner, you to take an official note of an affidavit of service which was executed by Pedro Fortesa on August 7, 1959, and filed with the Maritime Board, together with a [letter giving our] dated August 4, 1959 and specimen contracts dated September 1959, in connection with the Board order which compelled Grancolombiana to open up its space for numerous shippers. The other documents are not form contracts. Let's see what they are.

Mr. Kharasch: I'd be glad to stipulate these documents were filed with the Board as a result of the Board's order. I am not sure of the relevancy but I have no doubt of their authenticity. I never saw the certificate of service but I will be glad to stipulate that was filed if I may have a copy of it.

Mr. Giallorenzi: Yes, certainly. And [as to] these four documents, [may it] be deemed that they may be marked in evidence.

Examiner Robinson: Are you just making reference to them or marking them in evidence?

Mr. Giallorenzi: Make reference to.

Mr. Kharasch: They are [in the] Board files, I believe.

Examiner Robinson: That is why I asked that.

Mr. Giallorenzi: And I also might point out various executed items in the addenda thereto are also in the files.

Mr. Dougherty: Will you consider them in evidence for our reference?

Mr. Kharasch: I will be glad to stipulate to any documents you want to refer to in the Board files.

Mr. Dougherty: These are also filed with the Board.

Hearing Examiner: They are filed pursuant to the Board order.

Mr. Kharasch: No objection.

Mr. Giallorenzi: What is the ruling, Your Honor?

Hearing Examiner: We will just refer to them.

\* \* \* \* \*

[fol. 361] (The Contract referred to above is as follows:)

This Agreement made and entered into this — day of September, 1959, by and between Flota Mercante Grancolombiana, S. A., a corporation organized and existing under and by virtue of the laws of the Republic of Colombia, hereinafter referred to as "FLOTA", and hereinafter referred to as the "SHIPPER".

\* \* \* \* \*

3. Freight shall be computed and paid at the rate of \$34.00 US currency per ton of 2,000 pounds based on total outturn weights. The shipper guarantees with respect to each vessel for the use of the refrigerated space specified in Paragraph 1 hereof, a minimum payment of freight to Flota at the rate of \$0.318 US currency per cubic foot of space made available to the Shipper, assessed on the 90% of the space allocated to the Shipper, whether or not the space is used; such minimum freight payment per type of vessel is as follows:

Name of Vessel	Cubic Al- located	90% Guarantee	Rate	Total
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Such minimum freight is to be paid by the Shipper in New York, N. Y. to Grancolombiana (New York) Inc., 79 Pine Street, New York, N. Y., within forty-eight hours after the vessel has reported for loading. Certified outturn weight certificates are to be furnished by the Shipper to Flota in

New York within one week after discharge of each vessel, and any additional freight charges over and above the minimum freight payment are to be remitted by the Shipper to Flota in New York within forty-eight hours after date of billing.

In the event that vessel or cargo is lost after reporting for loading and certified outturn weight certificates are not available, freight will be paid on the basis of the certified outturn weight certificate of the last banana shipment of the Shipper carried by Flota preceding such loss of vessel or cargo, or on the basis of the minimum freight payment required herein, whichever is greater. Full freight [fol. 362] shall be considered completely earned by Flota after vessel's reporting for loading and Flota shall be entitled absolutely to all freight and to receive it under all circumstances whatsoever, ship and/or cargo lost and/or not lost, or the voyage changed, broken up, frustrated or abandoned or the bananas damaged.

\* \* \* \* \*

Mr. Giallorenzi: I am simply trying or want to show the amount of space which was available on our ships. We took the October 1st date because that's the date when the various shippers went aboard the vessels. If you recall, Mr. Examiner, the attorney for Mr. Consolo picked the figure one-third out of the air and based all his calculations on the theory that in his opinion at least, there were three only qualified shippers and that therefore all of his damages were assessed or based on one-third of the net profit that he would have made on the Grancolombiana vessels. We propose to show through this witness that when it became an actuality and a number of shippers applied for the vessels, the amount of space which was granted to Mr. Consolo was far less than the one-third, and we therefore, argue with, I think, a great deal of logic that here we have an actual figure of X percentage which he was allotted.

\* \* \* \* \*

[fol. 363]

Room 705  
Federal Maritime Board  
45 Broadway  
New York, New York  
Wednesday, May 11, 1960

. . . . .  
HARALD SOLVANG having been first duly sworn by The  
Examiner testified as follows:

Direct examination.

By Mr. Dougherty:

Q. Your name, please?

A. Harald Solvang.

Q. And your occupation?

A. Ship broker.

Q. How long have you been a ship broker, sir?

A. In this country, since 1953, December; in Norway,  
since 1945, November.

. . . . .  
Q. Are you employed?

A. Yes.

Q. By whom?

A. J. H. Winchester and Company.

. . . . .  
Q. What is the business of J. H. Winchester?

A. Ship brokers and agents.

Q. Now, will you tell us, briefly, what is the function of  
a ship broker?

A. Well, it works both ways. We get inquiries from char-  
terers to find ships for either time charter or [for] car-  
goes, and it works the other way. We might have [owners]  
come to us asking to find employment for their ship.

Q. Do you get descriptions or specifications of the ves-  
sels that are sought by charters or sought to be chartered  
by owners?



A. Oh, we always keep records in the office on each ship on these cards here.

Q. Do you have a special department within the chartering department just for reefer ships?

A. Yes, I handle that.

Q. You always handle that?

A. I handled it since 1954—'54 or '55—'54.

[fol. 364] Q. Do you have a card for a vessel called FEDALLA— Spell it, please?

A. F-E-D-A-L-L-A; a Dutch flag built 1951.

Q. Now, in your opinion, is that vessel suitable for carriage of bananas?

A. Well, my basis, I know she has carried bananas.

Mr. Examiner: Do you know anything about the outturn of cargo, whether it was damaged in any way, or do you happen to know that?

The Witness: Nothing at all.

Q. Is there anything on your card to show that it's capable?

A. Well, I have on my card, bananas. She has four compartments each. Forced electrical ventilated, can go to minus 20 degrees centigrade, which is anything. They carry from frozen, deep frozen products, up to anything.

Q. Do you have a card for the vessel called VAL-FREDIE?

A. No, I remember the ship. I think she has been sold in the meantime. I don't know the new owners.

Q. Do you know anything of that vessel?

A. All I remember, it was an Italian ship, small ship, Italian ship.

Q. Do you remember in what trade she was employed?  
 A. I think the Mediterranean trade.

Q. Do you have a card for a vessel called CASA-BLANCA?

A. Yes.

Q. What does your card show, concerning the vessel CASABLANCA?

A. You want me to read it all?

Q. Where pertinent parts you can characterize it.

A. Dutch flag built in 1951, 50,750 cubic feet, bale, 13. 13 and a half knots, 4 to 4 and a half tons of [oil], according to owners description; temperature down to minus 20 degrees centigrade. Banana fitted 4 holds. That's what I have.

[fol. 365] A. I know she has carried bananas.

Q. On the basis of the information of your knowledge of the vessel, is it your opinion that she is qualified to carry bananas?

A. Yes, I would say so. I don't know—I don't know exactly how all the cargoes come out. I'm sitting in New York, and the ships are in the Gulf. It's impossible for me to say how many cargoes. The ships are coming into the Gulf I'm sitting here in New York. The cargoes are in the Gulf, referring to your previous question. All I can say, the ships had carried bananas.

Q. She has carried bananas?

A. That I know.

Q. Do you have a card on a vessel called ICEBERG or ISBYRD? I don't know which.

A. ICEBERG, and ICE PRINCESS, and ICE FLOWER. ICEBERG was sold.

Q. Do you have any information or knowledge on the ICEBERG?

A. No, I never fixed the ship myself, so I don't know.

Mr. Examiner: Does your card tell anything on it?

The Witness: No, I don't have a card. It was sold and it's under a new name. I knew there was a ship like that, Norwegian ship.

Q. Do you know whether she ever carried bananas?

A. No, I don't.

Q. What information do you have on a vessel called ICE FLOWER?

A. ICE FLOWER, Norwegian, built in 1956, 40,000 cubic feet. 12 knots on 4 tons, temperature down to minus 20 degrees centigrade, 2 holds, 3 hatches, 6 turrets.

Q. Do you have any information as to whether this vessel was fitted to carry bananas?

A. No, I don't know whether she had been— She has been sold.

• • • • •

Q. Do you have a card for a vessel called KENNING RAY?

A. Yes. Dutch flag, built in 1952, sister ship to the CASA-[fol. 366] BLANCA, as far as I know. The same cubic, 50,750, temperature down to minus 20 degrees centigrade.

• • • • •

Q. To your knowledge, has the KENNING RAY been employed in the banana trade?

A. Yes, she has.

Q. Do you have a card on a vessel called JOSEPH ELANSA or JOSEPHINE, I'm not certain as to whether I got that yesterday.

A. No, she has been sold, I think.

• • • • •

Q. Is it your opinion that the vessel of those characteristics could carry bananas?

A. Yes.

Mr. Lippman: He testified he didn't even know the characteristics. He said he had no knowledge. How can he testify?

A. Any ship can carry bananas.

Q. Did you offer this vessel as a banana carrier?

Mr. Examiner: I think I ought to inject something here myself. I won't take that statement literally, because we all know any ship can not carry bananas, in spite of what the witness says. Go ahead.

. . . . .

By Mr. Dougherty:

Q. Did you offer it as a refrigerated ship?

A. Yes.

Q. Do you have a card on a vessel called BURFIN?

A. No, not here.

Q. I beg your pardon?

A. Not here now. She was on my list.

Q. Yes.

A. It must have been sold. You know these ships change names all the time.

Q. Do you know the vessel?

A. I remember the name, that's all.

Q. Do you know whether it was fitted to carry bananas?

Mr. Lippman: He just testified that he [remembers] the name, that's all.

Mr. Examiner: I [sustain] that.

By Mr. Dougherty:

Q. I didn't hear that.

A. I just remember the names; she was a small ship. [fol. 367] That's all. I don't remember any more.

. . . . .

Q. Do you have a card on a vessel called FISCO?

A. Yes.

Q. Will you tell us what your card shows?

A. She's Finnish flog, built in 1957, about 40,200 cubic feet, about 11 and a half knots, and Lloyds, temperature down to minus 20 degree centigrade; able to maintain different temperatures 4 holds, 4 hatches.

Q. Is it your opinion that this vessel FISCO could carry bananas?

Mr. Lippman: Objection.

Mr. Examiner: Is there anything on your card to show she has carried bananas?

The Witness: No.

Q. Do you know anything about it, to your own personal knowledge? Has she ever carried bananas?

A. No.

\* \* \* \* \*

Mr. Examiner: If he can demonstrate to me by any line of questioning that he knows, actually, this ship can carry bananas, you, personally, I can put it in.

Mr. Dougherty: I don't think it's necessary to go that far.

Mr. Examiner: Simply because a ship has refrigeration, doesn't necessarily mean that she is fitted properly to carry bananas. She may or may not be, and that's why I say if he wants to add anything to show, if he has any particular reason, by all means do it.

\* \* \* \* \*

Mr. Examiner: You can't overlook the fact that these blower fans remove the gas and that's the point that concerns me. If this gentleman knows, he certainly can answer you. Go ahead and pursue the question. [Mr. Giallorenzi] I guess he is undoubtedly a qualified expert in refrigerating. He has been in this business many years. There are very few that have this verbal knowledge, and certainly in my opinion, [he] is eminently qualified to testify. [Mr. Robinson,] I tell you what I'll do. I will let him answer the question, and later on if, on cross-examination, it's been brought out that he is not in a position to, then we [fol. 368] will pass on it. In the meantime go ahead.

\* \* \* \* \*

By Mr. Dougherty:

Q. Do you remember a card on a vessel called MASSADAN or MAGADAN?

A. MAGADAN, yes. Danish flag, built in 1956, about 62,000 cubic feet, about 12 and a half knots on 7 to 8 tons—Lloyds—can go down to 26 degrees centigrade.

Q. Now, is it your opinion, based on your experience and the information that you have about that vessel, that she can carry bananas?

A. Yes.

• • • • •

Q. But that would not appear on your card?

A. No, that would be on the list that I sent out.

Q. I see. Did I ask you about a vessel called ICE PRINCESS?

A. Yes.

Q. Or ICE FLOWER?

Mr. Examiner: I don't think you did. You said ICE-BERG and ICE FLOWER, but not ICE PRINCESS.

The Witness: That's right.

Q. Are these ice vessels generally of the same class, to your knowledge?

A. Yes, several of them are sister ships.

Q. And do they generally have the same characteristics?

A. They are. I think there are only two built of 40,000 feet and two of 60,000 feet. In other words, each of the two were sister ships.

Q. What do you have on the vessel ICE PRINCESS, if anything?

A. Norwegian, built 1957, about 60,000 cubic feet, about 13 knots, and about 5 tons of oil. Temperature down to minus 20 degrees centigrade, minus 40 degrees fahrenheit, 5 compartments; 3 were different temperatures.

Q. Again, sir, is it your opinion that this vessel could carry bananas?

A. Yes.

Q. And its sister ships?

A. Yes.

[fol. 369] Q. Do you have a vessel called BORGUND, approximately 30,000 cubic feet?

A. Yes. BORGUND, Norwegian, built 1959, about 30,000 cubic feet, about 11 and a half knots.

Mr. Examiner: Is that a refrigerated ship?

A. But I know she is built for Norwegian fish trade, so she can freeze down to minus 20, I'm sure.

Q. In your opinion, could she also carry bananas?

A. Yes, in my opinion; yes.

Q. What information have you on a vessel called C-A-R-T-I-N-D? Maybe it begins with "C," I'm not sure.

\* \* \* \* \*

A. Karringtand, is that what you want, K-A-R-R-I-N-G-T-A-N-D?

Q. Approximately 34,000 cubic feet?

A. Yes, 34,000, about 12 knots, Norwegian flag, down to minus 20 degrees centigrade.

Q. In your opinion, sir, is this vessel—can this vessel be used in carrying bananas?

A. Yes.

Q. Now, sir, what information have you on a vessel called K-E-R-I-T-R-A?

A. K-E-N-I-T-R-A, Dutch flag, built 1952, about 50,750 cubic feet. Here again sister ship, I think of the other two CASABLANCA. Yes, and one other one. About 12 and a half, 13 knots, and 4 to 4 and a half tons of oil. Temperature down to minus 20 degrees centigrade.

Q. And is this vessel also capable of carrying bananas?

A. Yes. This ship I know has carried bananas.

\* \* \* \* \*

Q. Now, sir, what information have you on a vessel called CARE.

A. CARE, Swedish flag, built in 1955, about 45,770 cubic feet, about 11 knots on 4 tons gas oil, temperature in drop X minus, down to minus 15 degrees centigrade, otherwise down to 17 or 18 centigrade.

Q. Do you know this vessel?

A. Yes.

Q. Is it, in your opinion—is she capable of carrying bananas?

A. Yes.

[fol. 370] Q. Do you know whether she has carried bananas?

A. No, but I was negotiating her once for it.

Q. I beg your pardon?

A. I remember negotiating the ship once for bananas trade.

Q. Do you have any information about a vessel called CONSULHORN?

A. That's right. She is a German flag, built in 1957, about 30,774 cubic feet, about 11 knots on two and half tons gas oil. She is a sister ship to the THERASEHORN. Temperature from plus 11 degrees centigrade to minus 20 degrees centigrade can cool differently each hold. She has two holds, two hatches.

Q. In your opinion, is this vessel suitable for carrying bananas?

A. Yes.

Q. Do you know whether it has carried bananas?

A. I think she has. I know she has been running in the Western Hemisphere for a long time, but I'm not sure about it.

Q. The sister ship is the T-E-R-E-A-H-O-R-N?

A. T-H-E-R-E-S-E-H-O-R-N. It's about 15 ships like that.

Q. It's sister ship to the Theresehorn?

A. Yes.

Q. Do you know anything about that vessel?

A. No, I do not. I mean, I have a card. Is that what you mean?

Q. What do you have?

A. It's a sister ship, same details as on the Consulhorn.

Q. What are the details?

A. German, built 1957, about 30,774 cubic feet, about 11 knots, at two and a half tons of gas oil, sister ship to Consulhorn, temperature from 11 degrees down to minus 20 degrees centigrade. Can cool differently each hold. She has two holds.

Q. Are there other Horn ships, for example, KLAUS-HORN?

A. Yes.

Q. Do you know anything about these other Horn ships?



A. I know several—I have been trading on this side.

Q. As what, sir?

A. Some of them bananas, some of them in meat. Fruit, eggs, and anything.

[fol. 371] Q. Are you able to tell us which ones were carrying bananas?

A. I know partly some of them. KLAUSHORN, MAIRE-HORN, [are chartered to] Carribbean-Hamburg line in Miami. I know two or three others. I have it in the office, the names. I can't remember it here now. I know it was horn ships.

Q. Do you know whether they have been available for charter during this period of 1955, through October 1959?

A. Most of them are built, let us see now—KLAUS-HORN was built in '58. She was on the market. She was fixed right away for the banana trade. KONSULHORN was built in 1957. He built all these ships from '57 and onwards, '57, '58, '59 and he had some coming out this year.

Q. Is it your opinion, sir, that the horn vessels are suitable for carrying bananas?

A. As far as I know, they have been for a long time. Like I said before, I can't—I don't know how the bananas are coming in to the Gulf. I am sitting here in New York. I don't know what condition they are in.

Q. It's not part of your job to check the bananas?

A. No.

Q. How many of these Horn ships are there all told?

A. I would say about 15; I would say about 15.

Q. Are they all generally or of recent built?

A. Yes. As I said, '57, '58, '59, and this year.

Q. And do they all have generally the same characteristics as to refrigeration?

A. Yes. As to the refrigeration all of them seem to have the same. The sizes vary, though.

Q. Do you have any information on a vessel called PRINCE REEFER?

A. PRINCE REEFER, Norwegian flag, built in 1950, about 43,550 cubic feet, about 12 knots on 5 tons of oil,

temperature down to minus 20 degrees centigrade, 3 holds, 3 hatches.

Q. Is it your opinion, sir, that this vessel is suitable for carrying bananas?

A. Yes, I think so.

Q. Do you know whether she has carried bananas?

A. That I don't know.

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[fol. 372] Q. What information have you on a vessel called TERN, approximately 44,610 cubic feet.

A. A British flag, built in 1953, about 44,610 cubic feet, about 10 and a half knots, and three and a quarter tons of gas oil. Temperature down to 5 degrees fahrenheit, which is minus 15 degrees centigrade, banana fitted.

Mr. Lippman: Can I ask a clarifying question here. You just said that the TERN was banana fitted. Does that information appear on your card?

The Witness: That's right.

By Mr. Dougherty:

Q. In the other instances when you have not said Banana fitted, that information does not appear on your card?

A. That's right.

Q. You have mentioned every instance where the term banana fitted does appear on your card?

Q. Yes.

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Q. What information have you on a vessel called FRIGORA?

A. FRIGORA, Norwegian built, 1957, about 59,000 cubic feet, about 13 knots, and about 8 tons of gas oil, fully electrically ventilated, temperature down to minus 20 degrees centigrade, that's minus 40 degrees fahrenheit, 5 compartments, 5 separate temperatures, 75 air changes per hour, deck heights between 6 feet 5 inches and 8 feet 5 inches, two holds, banana fitted, 6 hydraulic derricks, 6 winches, and 6 derricks three tons.

Q. And is it your opinion, sir that that vessel is suited for carrying bananas?

A. Well, I know she is carrying, or she has been, and I still think she is carrying bananas.

Q. Now, sir, what information have you on a vessel named STATT SCHELWIG, approximately 31,000 cubic feet?

A. STATT SCHELWIG, sister ship to the DORA-HORN, about 31,000 cubic feet, about 11 knots on 3 tons of gas oil, German flag, built 1958, temperature from plus 11 degrees centigrade to minus 20 degrees centigrade. Highest class German—Lloyds—2 holds can pull differently [fol. 373] in each hold, 4 winches, 4 derricks, 2 hatches, and I have the size of the hatches. I guess you don't need that. I have some of the sizes, before, of the hatches, which I haven't read off. She's one of the Horn group ships.

Q. She is included in that group of about 15 Horn ships that we previously discussed?

A. That's right, yes.

. . . . .

Q. Do you have any information on a vessel named LAKHISH?

A. LAKHISH—Israel, built 1958, about 15,300 cubic feet, about 13 knots on 6 knots diesel oil. Temperature down to minus 20 degrees centigrade, banana fitted.

Q. Is it your opinion this vessel is suitable for the carriage of bananas?

A. Well, she has been in that trade for the last 10 to 12 months.

Q. Now sir, what information have you on a vessel named HILDEGARDE?

A. HILDEGARD, German flag, built 1958, about 61,800 cubic feet, gross about 57,000, cubic feet for bananas, about 12 knots and about 5 tons of gas oil, temperature from plus 12 degrees centigrade to minus 20 degrees centigrade, 60 air trays per hour, electrically ventilated, BBC refrigeration, 4 compartments, 2 holds can be differently in each hold, 4 winches, 4 derricks, 2 hatches.

Q. What would be your opinion as to whether that vessel is suitable for the carriage of bananas?

A. Well, she is in the banana trade now. She has been [redelivered] in the past month.

• • • • •

Q. Now, bearing in mind this period of approximately November 1955 to October 1959, can you tell us whether there were any other vessels which, in your opinion, were suitable for the carriage of bananas, and which were available for charter?

A. You mean other than what was mentioned?

Q. Other than the ones we have mentioned by name.

A. I—

Q. Do you, for example, know of any new buildings during this period, or might I suggest that you might glance [fol. 374] through your card file, and limiting yourself to the range of approximately 30,000 to say 60,000 cubic feet, mention any other vessels of that type that were available during this period?

A. Well, that's very difficult for me to say when they were available. That's very hard for me to say. They were all on my list. They were all available.

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Mr. Examiner: This doesn't show the dates whether they are available anyway.

By Mr. Dougherty:

Q. Do you know, generally, any other new vessels which became available during that period?

Mr. Examiner: Again, Mr. Dougherty, as I understand him, his cards don't show what period they are available. He may just have them listed.

Mr. Dougherty: That is the reason for my last question, whether he knows generally, of his own knowledge, and independently of what his cards might show.

A. The only way I could check it is to see when they were built. Then they would be on the market. Here is

one I don't know whether it was on my list, CARRIBIA, Norwegian, built 1953, about 14,500 cubic feet, 12 to 13 knots on 4 tons diesel oil. And also another one, the AUARGA, about 35,000 cubic feet, 11 and 11 and a half knots on 3 tons gas oil, Dutch flag. I don't have notes when she was built.

Mr. Examiner: I think we are only wasting time unless this gentleman knows whether they are available at that time.

By Mr. Dougherty:

Q. Are these two you just mentioned you know it was available during that period?

A. I know the AUARGA, she was fixed [to] some South American [charterer], and the CARRIBIA is on the market on and off, employed on the Norwegian coastal trade. She's here once in awhile asking for business.

Q. What sort of business?

[fol. 375] A. Well, mostly she's out of business back to Europe, so she's coming over here for meat, and she wants to go back to Europe, and the fish for the season from Norway.

Mr. Dougherty: I have no further questions of this man.

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Cross examination.

By Mr. Kharasch:

Q. Have you offered [their] reefer ships through your circulars frequently?

A. Yes.

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Q. Have you ever been in the banana importing business?

A. No.

Q. Do you know how many days [ocean] travel [it] would take a 13 knot ship between Guayaquil and Philadelphia?

A. I don't know exactly.

Q. Do you know how many days of ocean travel under refrigeration bananas can stand before the cargoes spoil?

A. No.

Q. Are you familiar with the fact that bananas as they are ripening give off gas?

A. Yes.

Q. Do you know what that gas is?

A. No.

Q. Do you know what the effect is of leaving that gas in the holds where the bananas are?

A. I can imagine it's not so good.

Q. And what way do you imagine it would not be good?

A. I guess it would spoil the bananas; I don't know.

Q. Your cards contain no notations as to the price at which any of these ships were available, is that correct?

A. That's correct.

Q. Do you have any idea of the economic feasibility of chartering any one of the ships you named to go between Guayaquil and Philadelphia to carry bananas?

A. No.

Q. Would you say your answer out loud, please?

A. Pardon me.

Q. Would you give your answer out loud. The reporter doesn't get it when you shake your head.

Mr. Dougherty: The answer is no.

The Witness: No.

[fol. 376] By Mr. Kharasch:

Q. Can you tell us how much per ton of bananas carried to Philadelphia from Guayaquil would cost on each of the ships you named?

A. No.

Q. We are clear that in every case where a ship was indicated in your card file as being fitted for the carriage of bananas, you named that?

A. Yes.

Q. Are we also clear that whenever a ship had any special notation as to the ventilation system you also named that?

A. Yes.

Q. How many changes of air an hour are necessary in a ship carrying bananas?

A. I don't know.

Q. Do you know whether any of the ventilation systems you have described have draft forced air [exhaust]?

A. Forced ventilation, I know some of them have.

Q. Have you— If you had read into the record a note that the ship had forced ventilation, you assume from your records it had forced ventilation?

A. Yes.

Q. Otherwise do you know anything about the ventilation?

A. I know most of them have electrical ventilation. I presume it's forced; I don't know.

Q. Do you know anything about the capacity of the system, except as you have read some notes into the record?

A. No; only as appeared here on the cards.

Q. You said during your direct examination that any ship can carry bananas, and I assume, physically, that is true, you can put a banana on any ship in the world, can't we?

A. Not unless it's a [reefer] ship.

Q. Are there not banana trades, sir, in which bananas are carried not under refrigeration for a short distance?

Mr. Giallorenzi: I object to the question. I don't see the relevancy of it.

Mr. Kharasch: I am cross examining him because he has presumed to say that in his opinion, these ships are qualified to carry bananas.

[fol. 377] Mr. Giallorenzi: But they are refrigerated ships, not ships without refrigeration.

Mr. Examiner: His answer was, a while ago, that any ship can carry bananas, and that is why I objected to the question. We know that isn't actually true in most cases. It has other things to go along with it, and I think that is what Mr. Kharasch is trying to explore.

Q. What do you mean when you said any ship can carry bananas?

A. I was only talking about these ships.

Q. And it's your opinion that any refrigerated ship can carry bananas?

A. Not over 90 percent, I would say.

Q. And how much ventilation is required for a ship to carry bananas?

A. That I don't know, because no charters have asked me that question.

Q. Some of your [cards] do indicate how much ventilation there is, 60 [changes] of air an hour?

A. Yes.

Q. Some of your cards [do] not?

A. Yes.

Q. Most of your cards [do] not?

A. That's right.

Q. How long would it take to load any one of the ships you named in Guayaquil with a cargo of bananas?

A. Gee, I have no idea. I don't follow that.

Q. Do any of the ships you named have side ports?

A. No small ships have side ports.

Q. No small ships have side ports, is that right?

A. Well, I don't think any of these, as I can remember, have any side ports. Maybe, I think I had a couple; maybe I have.

Q. Do you know anything about the process of loading ships in Guayaquil or other Ecuador ports?

Mr. Giallorenzi: You mean loading ships with bananas?

Mr. Kharasch: Yes.

The Witness: I have heard they loaded—they carried stems over their backs, you know.

By Mr. Kharasch:

Q. And do they carry—the stevedores, the longshoremen, [fol. 378] carry stems over their backs to the side ports, do they not?



A. If they have side ports, maybe they do.

Q. You said as to a ship named CASABLANCA, that the ship was qualified to carry bananas, and it came into the Gulf with bananas?

A. Yes.

Q. Do you know if it ever came through the North Atlantic with bananas?

A. That I don't know.

Q. Did you fix the CASABLANCA?

A. Yes.

Q. To the North Atlantic?

A. No.

Q. Have you fixed the CASABLANCA at all?

A. Yes.

Q. In what trade?

A. Into the Gulf [from] Guayaquil.

Q. Have you fixed any of the other ships you named to the North Atlantic?

A. With bananas?

Q. Yes, for the banana trade.

A. No.

Q. Have you fixed any of the other ships you named with bananas to the Gulf?

A. The DOLENTIME charter.

Q. And that was to the Gulf?

A. Yes.

Q. And it was coming from Ecuador to the Gulf?

A. That's what I—I didn't follow each voyage.

Q. Is it a shorter voyage from Ecuador to the Gulf than Ecuador to the Atlantic?

Mr. Giallorenzi: Would you please specify the port in the Atlantic. There are many.

Mr. Kharasch: Philadelphia.

The Witness: I could check it here. I would say it's the same.

By Mr. Kharasch:

Q. Do not the ships come from the Panama Canal?

A. Yes.

Q. And also from the Panama Canal to New Orleans [or] to Philadelphia?

A. It's a shorter way to New Orleans.

Q. To get to Philadelphia, the ship has to [swing] around Florida to [come to] the Atlantic Coast; to get to New Orleans, it has to come [through] the Canal almost directly to New Orleans?

[fol. 379] A. I'm [often] surprised when I look at distances in the Gulf. I don't have anything to do with the distances.

Q. What did you mean when you said that a ship, the THERESEHORN, for example could carry from 11 degrees centigrade to minus 20 degrees centigrade? What is the significance of the [highest figure]?

A. The highest and the lowest temperature.

Q. It could not carry cargo higher than 11 degrees centigrade?

A. That's my understanding.

Q. Do you have that sort of range of temperature information on any ships except the ships where you gave us this range of temperature?

A. I didn't get you that. Do I have it for other ships?

Q. For the THERESEHORN you told us explicitly it could carry [from] 11 degrees centigrade, [to] minus 20 degrees.

A. All the Horn ships, because that's the way it was listed to me. Other ships only list the lowest temperature.

Q. What is the temperature [at] which bananas must [be carried] under refrigeration?

Mr. Giallorenzi: I object to that question, because the testimony has shown it's common knowledge that each and every banana shipper determines what temperature he wants to have his bananas carried, depending on the lengths of the voyage, the thickness of the skin of the bananas, and without that information I think that question is impossible to answer.

Mr. Examiner: I am sure he is going to answer he doesn't know, but that's no reason the question can't be propounded

to him, because Mr. Dougherty's questions all went to whether or not these particular ships were capable of carrying bananas, and that's only one of the ways he can find whether this gentleman knows. We know from the Grace Line, in your case, that those temperatures didn't vary too much, regardless of the thickness of the skins, and he may know, or may not know, but I think the question is certainly proper in all the circumstances.

A. Around 50 degrees, it might be my understanding.  
[fol. 380] Q. Fifty degrees Fahrenheit?

A. Yes.

Q. You stated that the BORGUND was built for the fish trade?

A. I think so. Most of [the] small [reefers] are built for coastal trades.

Q. And what did you mean by the fish trade, frozen or refrigerated fish?

A. Frozen.

Q. From where to where was that?

A. Well, anywhere from Norway to United States, from Norway down to the Mediterranean, or from Iceland [to] Europe.

Q. You say most small ships were built for the coastal trade. Does that apply to most of the reefer ships that you named at this point?

A. Yes.

Q. This morning?

A. Yes.

Q. Does fish require frequent changes of air when it's carried under refrigeration?

A. That I don't know.

Q. You stated that the BORGUND, in your opinion, could carry bananas.

A. Yes.

Q. Does the BORGUND have banana fittings?

A. That I don't know.

Q. Does it have ventilation systems suitable to carry bananas?

Mr. Examiner: You can look at your cards if you want

to.  
The Witness: There's nothing in the cards about that.

By Mr. Kharasch:

Q. Does it have a speed sufficient to engage in the Ecuador-United States-North Atlantic banana trade?

A. Well, I don't know, because I am no specialist, but I have—if it has bananas there, you keep it at a certain temperature. [Otherwise], it ripens quicker.

Q. Eleven and a half knots [is not] a very fast ship in modern terms?

A. About the average in small ships.

Q. How does that compare to large ships?

A. It varies from 14 up to 18 [on] the larger ships. The larger ships, the better the speed you can get than on smaller ships.

[fol. 381] Mr. Dougherty: Did you ever inspect the BORGUND?

The Witness: I think I fixed it once on a voyage going to Europe on the Mediterranean.

By Mr. Kharasch:

Q. Did you ever fix the BORGUND [in] a banana trade?

A. No.

Q. Let us take the MAGNADAN. Does that ship have banana fittings?

A. I think she has.

Q. Would you look at your cards and state whether it has banana fittings?

A. It doesn't say anything, because I haven't heard it was actually in the trade, but I know the owner very well. He has fittings that can carry anything.

Q. Do you know as to this specific ship, whether this specific ship has banana fittings on it?

A. No, I wouldn't.

Q. Do you know, as to this specific ship, what the ventilation system is?

A. No.

Q. Do you know, as to this specific ship, whether it was ever used from the Ecuador to the North Atlantic banana trade?

A. I don't know.

Q. Do you know whether this specific ship, whether it was available at a price which would make it economically feasible to put it in the banana trade?

A. I have no idea.

Q. In what trade has the KENITRA carried bananas?

A. From Ecuador, I think, into the Gulf.

Q. In what trade has the KARE carried bananas?

A. I don't know whether she ever carried bananas.

Q. In what trade has the ICE PRINCESS carried bananas?

A. I don't know whether she ever carried bananas.

Q. In what trade has the KLAUSHORN carried bananas?

A. As far as I know, Ecuador into the Gulf.

Q. I believe we are clear that you have no knowledge of the condition of the bananas discharged from any of the ships that have carried bananas into the Gulf.

A. I have seen ships discharging bananas into the Gulf, is that what you mean?

[fol. 382] Q. Did you not state on direct examination, that you can not say what the condition of the bananas was on out turn? Whether they had ripened on the voyage?

A. Well, I think it's shipped down to the Gulf, and I know the ship discharged bananas, as I saw the bananas there, but I don't know if they were good or bad. I don't know. I just saw the discharging operation.

Q. Have any of the ships you named been in the North Atlantic banana trade from Ecuador?

A. Not that I know.

Q. That couple of instances you told us the heights of the decks of some ships, did you have any other information about the other ships where you did not give the heights of the deck?

A. Not in my cards. I might have it in my plans in the office.

Q. Do you have any knowledge as to how high a hold must be to be suitable for bananas?

A. About 8 feet; that's the ideal height.

Q. I don't understand that—beyond that is not good, is that right?

A. That's my understanding.

Q. I want to be perfectly clear on this last point. All the ships you have named were brought to the attention of Grancolombiana, is that right?

A. Yes, and 50 other people.

Q. I am interested only in Grancolombiana. They were brought to their attention, to your circulars?

A. That's right.

Q. The man you dealt with was Mr. Finnelli?

A. Finnelli.

Q. And in no instance did Grancolombiana charter such a ship?

A. No.

Mr. Kharasch: No further questions.

Mr. Examiner: Mr. Dougherty?

Direct examination.

By Mr. Dougherty:

Q. The vessels we were just discussing, CASABLANCA, BORGUND, MAGNADAN, KENITRA, KARE, ICE PRINCESS and KLAUSHORN, could they have come to the North Atlantic?

A. They could have, sure.

Q. From Guayaquil?

A. Oh, yes.

[fol. 383] Q. They had a sufficient radius to make that trip?

A. Yes.

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Recross examination.

By Mr. Lippman:

Q. You said some of these ships could have come to the North Atlantic. Their radius was sufficient. By that you mean, if they carried enough oil or other fuel?

A. Yes.

Mr. Kharasch: Do you know what would have happened to the cargo of the bananas if they came to the North Atlantic?

Mr. Giallorenzi: I object to that. It's speculative, and it depends on the condition of the circumstances—the condition of the cargo at the time they were put aboard, and nobody in this room would hazard a guess.

Mr. Examiner: That's fundamentally true, but it's also no different a question as the one propounded on your side as to whether or not these ships were capable of carrying bananas, so he may or may not know the answer. So I'll permit him to answer the question if he knows.

The Witness: What happened to the cargo, is that the question.

By Mr. Lippman:

Q. Yes.

A. I don't know.

Q. Is your information regarding the refrigeration system of some of these ships, or any of these ships, sufficient for you to tell us how long it would take these—such refrigeration systems to reduce the temperature of the cargo from outside temperature in Ecuador to 50 or 52 degrees?

\* \* \* \* \*

Q. And do you know whether there were any of these refrigeration systems, or how long it would take any of the refrigeration systems, on the ships you name, to bring the temperatures of the bananas [down from] let us say from 85 degrees?

A. No, I don't know.

Q. You said, on redirect examination that any of these ships could have come to the North Atlantic?

A. Yes.

[fol. 384] Q. To your knowledge, did any of the ships come to the North Atlantic?

A. Not that I know of.

Q. The charters of which you have any knowledge [were always to] the Gulf, is that right?

A. That's right.

• • • • •

Q. You mentioned a ship called the TERN had a speed of 10 and a quarter knots.

A. Yes.

Q. Is that quite slow as ships go these days?

A. It's slow, yes.

Q. You have no information to offer us as to the charter terms on any of these ships?

A. You mean now, today, what the market is today?

Q. Not today, but during the period of testifying about from 1955 to October 1959, you said some of the ships were fixed. Do you know how much?

A. I have some records in my office. I would only be guessing. You want me to guess, I'll guess.

Q. I don't want you to guess. Do you know in particular as to the TERN, as to whether or not it arrived at Gulf ports with bananas which [had] ripened?

Mr. Giallorenzi: I object to that question.

Mr. Examiner: He already said several times he knows nothing about the out turn of any of these ships.

By Mr. Lippman:

Q. Can you give me a general idea, sir, of the crew aboard a reefer ship with 50 or 51,000 cubic feet?

A. How many crew members?

Q. Yes, sir.

A. I guess about 8 or 9, or so.

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JOSE J. BORRERO

\* \* \* \* \*

Direct examination.

By Mr. Dougherty:

\* \* \* \* \*

Q. Mr. Borrero, after the Grace Line decision I refer to, the one Mr. Robinson gave, that was affirmed by the Board, I believe, I don't know the Docket No.  
[fol. 385] Mr. Giallorenzi: 771 and 775.

Mr. Dougherty: Thank you.

By Mr. Dougherty:

Q. Did you receive requests for space from various ship-pers?

A. Yes, we did.

Mr. Dougherty: I would like to have this document marked only for identification.

Mr. Examiner: 118 for identification.

(The document described above was marked Exhibit 118 for identification.)

\* \* \* \* \*

By Mr. Dougherty:

Q. Can you tell me, Mr. Borrero, how many [different] [names] are on those two sheets, and what are the [per-sons] or firms or corporations whose names are on those sheets?

A. What?

Q. How many different names are on those sheets?

A. Twenty-nine names.

Q. And in what connection did you make up that list, or what was the reason why that list was prepared?

A. Well, this was prepared, based on the letter of request that we received for space.

Q. In other words, the names on that list, the 29 names, constituted separate requests made for an allocation of space on the Grandcolombiana vessels, is that correct?

A. I would say so.

Q. Now, if the Board had directed Grandcolombiana at any time prior to the time when it actually did to open up the space, would Grandcolombiana have sent inquiries to those various persons on that list which inquired about the available space?

A. Yes, definitely.

Q. The same manner which it did in September 1959?

A. Same way.

Q. Would you have granted space on behalf—would Grandcolombiana grant space to each and every one of those [fol. 386] shippers if they had all applied, and you have found them to meet with the requirements which you laid down?

A. It had to.

Q. It had to?

A. Yes.

Q. Each and every one of the 29?

A. Each and every one of the 29—25 applicants.

Q. In other words, it could have been 15, or 10, or 2, is that right?

A. Definitely.

Q. If any number answered Grandcolombiana and requested it would have divided the space in accordance with their demands?

A. We were bound to it, don't you understand.

By Mr. Kharasch:

Q. Mr. Borrero, are Galland, Kharasch & Calkins, whose name appear on this list of 29 to which you sent letters, are they banana shippers?

Mr. Kharasch: Mr. Borrero said he had 29 different requests for space. I wish to know if names such as Galland, Kharasch and Calkins, which is the law firm which I am a member, David Suskind, whose name also appears here and [is a] lawyer in New York, I believe Richard Kurrus, who is a lawyer in Washington—that's all the lawyers I recognize offhand, are banana shippers or are they lawyers?

The Witness: I said that there were 29 names in those pages. I didn't say there were 29 shippers of bananas. Now, insofar as whether we sent a letter, we know whether the gentleman [had] requested [space] or not. I may say to you that if they were well known to [the] trade and [had made a request], they would [be sent a] contract for space on the Grandcolombiana.

By Mr. Kharasch:

Q. Well, I am asking you specifically about the lawyers names appearing on this list.

A. I don't know.

Q. Is there any reason that you sent a letter to my law [fol. 387] firm, except the fact that my law firm had written you regarding Philip R. Consolo's demand for space?

A. Well, we sent you a letter because you sent us a letter.

Q. And our letter was on behalf of Mr. Consolo, was it not?

A. Yes.

Mr. Examiner: Mr. Consolo's name appears on that list in addition to yourself?

Mr. Kharasch: It appears on the top of the list.

By Mr. Kharasch:

Q. And is there any reason that you sent a letter to Mr. Richard W. Kurrus, as he had written you a letter in behalf of banana distributors?

A. I sent a letter to Mr. Kurrus because he sent a letter in regard to space.

Q. On behalf of Banana Distributors?

A. It may have been.

Mr. Examiner: Is Banana [Distributors] listed separately, too?

Mr. Kharasch: Yes, it is.

Mr. Examiner: [As to] Mr. Suskind, does that show who he represents and whether or not they were also sent copies of the letter.

Mr. Kharasch: It shows that Mr. Suskind was sent a copy of the letter.

Mr. Examiner: Does his client's name appear on the letter also?

Mr. Kharasch: Yes, I believe so.

Mr. Giallorenzi: The client at that point was [R] Art Dixon and Company. The record shows all that.

. . . . .

By Mr. Kharasch:

Q. Does this list of 29 people include people that applied for space from the Gulf, or had written to you about space for the Gulf?

A. The list includes everybody that [whose correspondence asked] space.

Q. That includes people that asked for space to the United States Gulf ports?

A. Yes.

[fol. 388] Q. How many of the names on this list were people that applied for space?

A. I don't know.

Q. To the United States Gulf ports?

A. I don't know how many, Mr. Kharasch.

. . . . .

A. Most of them applied for the United States Atlantic Coast.

Q. How about Mr. Schuz?

A. I don't remember Mr. Schuz. I can't pinpoint any names. I may remember Mr. Consolo.

Q. [For] the Gulf port?

A. I think so, he applied for that, but there are letters [showing] everyone's request.

\* \* \* \* \*

Q. Would you do that, please. I show you Exhibits 76 through 94, and ask you to look at the names of the shippers there, or people who were concerned there, and I ask you to tell me how many names appear on the list that is before you that are not on Exhibits 76 through 94? How many names appear on the list of 29 which were not people whose correspondence introduced in Exhibits 76 through 94?

A. Seventeen.

Q. Is the Grand Shipping Company related to the West Indian Fruit and Steamship Company?

A. I understand so.

Q. What about Cosa Calvet Martinez?

A. I don't know.

Q. You don't even have the address of the Cosa Calvet Martinez?

A. The name of the company, that's enough.

Q. How about Atlantic Banana Company and the West Indies Fruit and Steamship Company?

A. I don't know.

\* \* \* \* \*

Q. Now, do you know if the address of the Atlantic Company is the same as the West Indies Fruit Company, did you notice that?

A. I noticed that.

Q. Are they associated?

A. That I don't know.

\* \* \* \* \*

[fol. 389] ALFRED A. CAMPION a witness, having been first duly sworn by the Hearing Examiner, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Campion, are you here pursuant to a subpoena served upon you in a proceeding entitled Philip R. Consolo v. Flota Mercante Grancolumbiana SA?

A. Yes, I am.

Q. At the present time what position do you hold with the Chilean Line?

A. Traffic manager.

Q. As traffic manager of the Chilean Line, tell us what your duties are.

A. My duties are booking of freight cargoes, scheduling of vessels, solicitation, almost every phase of cooperation that goes into dealing with customers or cargoes.

Q. Commencing with the year 1955, Mr. Campion, can you tell us the number of vessels, generally, with which the Chilean Line operated in the run which started in Valparaiso, I believe, and came to the North Atlantic ports?

A. Up to June, 1955, we had four C-2 vessels that had reefer space, approximately 29,000 cubic feet in each vessel. The speed of these vessels was about fifteen and one-half knots. In June, 1955, a new vessel entered the service and also had reefer space, a little more than the C-2's, I would say around 30,000 cubic feet, and in November of the same year another vessel entered the service. So, I would say, for the total of 1955 we had six reefer vessels in service.

The Examiner: What was the capacity of the last one reefer wise?

The Witness: The two new ones that came into service were sister ships with approximately 30,000 cubic feet each [fol. 390] available for bananas. The cubic capacity was larger but available for bananas, I would say, was about 30,000 cubic feet.

. . . . .

Q. Again referring to June of 1955, and for the rest of the period during that year, can you tell us the number of days which it took your vessels to come to a North Atlantic port, either Philadelphia, Baltimore or New York after, let us say, having left Guayaquil?

The Witness: If they stopped in Guayaquil?

Mr. Giallorenzi: Yes.

A. If the vessel did not discharge basic cargo which it carried, iron ore or nitrate, in the South Atlantic ports, and came direct to New York, that length of time would be about eleven days; the vessel might have stopped at Havana before arriving in New York and after leaving the Panama Canal, at that time that voyage was about eleven days.

. . . . .

By Mr. Giallorenzi:

Q. So that under ordinary conditions, in 1955, including a stop at Havana, you would make a trip to New York from Guayaquil, assuming you left Guayaquil, in eleven days?

A. Yes. We did have a contract for nitrate. There was an option as to whether the cargo could be discharged in the South Atlantic or in Europe because our vessels went to Europe after they discharged in New York.

. . . . .

Q. If you had loaded in a South American port and discharged it in a South Atlantic port, how many days would elapse before the vessels arrived, let us say, at New York?

A. Roughly thirteen days.

. . . . .

Q. Did you load any bananas for anyone in 1955, Mr. Campion?

A. Yes, we had a few shipments in the latter part of 1955.

Q. Do you know where those bananas were loaded?

A. They were loaded in Puna.

Q. Do you know when the first shipments began?

A. The first shipments began in July. I believe we had [fol. 391] five or six shipments and they ended in November when the Chilean fruit season began. That is the time that we did not call at Ecuador because we carried fruit from Chile.

Q. Just going back to Compania Sud-Americana de Vapores, is that a Chilean corporation?

A. Yes.

Q. During the Chilean fruit season is your reefer space used?

A. (Interposing) For the most part, yes.

Q. (Continuing) Is that used with Chilean fruits and melons?

A. Yes, right.

Q. Mr. Campion, can you tell us just about what period of time encompasses the Chilean fruit season?

A. Between December and May.

Q. During that period of time, naturally, you have to reserve your reefer space for the Chilean exporters, isn't that correct?

A. Correct.

. . . . .

Q. Other than the six shipments of bananas in 1955, you had no other shipments of bananas in that year?

A. No.

Q. Do you know whether they were carried for one shipper under the contract or did you have various shippers?

A. There were two shippers involved.

Q. On the same ships or different ships?

A. Different ships.

Q. There was one shipper on each vessel?

A. Yes.

. . . . .



Q. You have given us the cubic capacity of space available for bananas on the four C-2's and on the two vessels, the two sister ships, which came into service in 1955, the latter part of 1955. Can you describe to us the number of chambers available for bananas on your vessels?

A. Each vessel has four chambers.

• • • • •

Q. Looking at your records, can you tell us whether or not you solicited any banana business in 1955; by that I mean either telephone or written solicitation?

A. I might have telephoned, I don't recall; I don't have [fol. 392] any written memorandum on it.

Q. Do you know whether you received any request for space in 1955 from Philip R. Consolo?

A. I don't recall.

Q. If you had received any request from anybody in that year, would you have made a note of it, Mr. Campion?

A. I probably would, I generally do.

• • • • •

Q. Turning to 1956, Mr. Campion, you had six vessels fitted for reefer space in that year, is that correct?

A. Yes, that is correct.

Q. Those were the original four C-2's plus the two new ones?

A. Correct.

Q. Did you examine the records to see how long those vessels would take to come to New York?

A. In 1956?

Q. Yes.

A. The same as 1955, eleven days and thirteen days, depending on where the basic cargo was being discharged.

Q. That would be from Guayaquil?

A. Yes.

Q. Did the eleven days include the stop at Havana?

A. Correct.

Q. In 1955 the frequency of the service was twenty-one days, as I recall, is that correct?

A. Yes.

Q. In 1956 with the additional vessels, could you tell us whether the frequency of the Chilean Line service improved?

A. Yes, it improved. We had sailings from fourteen to sixteen days except every three months we had a chartered vessel which was not scheduled and the reefer space would then go to a period of twenty-eight days just for that one occurrence every three months.

Q. Other than the time when your reefer space was pre-empted for the Chilean fruit did you carry any bananas in 1956?

A. No, we carried no bananas at all in 1956.

Q. Did you solicit any banana cargoes in 1956?

A. My recollection is we did; we were working with one firm, Frank's Export & Import Company. We also solicited [fol. 393] [Andes] Fruit, Banana Distributors, Karl Suskind. Nothing materialized out of those inquiries.

Q. You say you solicited Banana Distributors; did you solicit them over the phone or in writing?

A. At that time I solicited them over the phone.

Q. Did you describe to Banana Distributors the type of service which the Chilean Line was offering?

A. Yes.

Q. Do you know who you spoke to at Banana Distributors in 1956?

A. There was a Mr. Adir.

Q. Do you know whether Mr. Consolo approached your company in 1956 or 1955 for space?

A. Not to my knowledge.

Q. Would the request have come to your attention as head of the traffic department?

A. Yes, I would say so.

Q. In 1957, Mr. Campion, how many vessels did you have in the same service that we have been talking about?

A. We had the same service, the same number of vessels, but the service changed to a certain extent.

Q. Can you tell us in what respect it changed?

A. We took two of the C-2 vessels and instead of sending them to Europe, after discharging in New York, we turned them around at New York whereby they loaded cargo in New York, Baltimore and Philadelphia and returned to South America.

Q. Did that change in the service, in that respect, increase the frequency of arrivals in the Port of New York?

A. No, it didn't increase the frequency of arrivals, no.

\* \* \* \* \*

Q. During 1957, did the Chilean Line carry bananas for anyone?

A. No, no bananas at all were carried that year.

Q. Did you solicit the trade?

A. Yes, we sent out letters to people who we thought might be interested in space.

Q. Can you tell us from looking at your files where, when [fol. 394] and to whom you sent out letters for banana space in 1957?

A. In April, 1957, we sent letters to El Morro Fruit Distributors, Inc., 99 Hudson Street; Frank Export Import Corporation, 100 West 31st Street; Banana Distributors, 30 Vesey Street; [Andes] Fruit and Produce Corporation, 19 Rector Street; William Torrino, 130 Park Place. I guess that is it.

\* \* \* \* \*

Q. Did you meet Mr. Consolo in 1957 at any time?

A. Yes, I recollect Mr. Consolo came to my office with Mr. Adir and that was the first time I got the impression that Banana Distributors was representing Mr. Consolo. I don't believe I met Mr. Consolo before that time.

Q. You do not recall meeting him prior to 1957?

A. No; I never got the connection, I might have spoken to him on the telephone.

Q. Do you know when in 1957 Mr. Adir visited you together with Mr. Consolo?

A. It is hard to say, I don't recall.

Q. But you do recall meeting him in your office?

A. Yes; I recall they came in to see me and I explained our service to them and I recall that Mr. Consolo was interested primarily in getting regular space all the year round which, of course, we couldn't offer. That was about the main point that I recall, more or less.

Q. Did you discuss rates, frequency of service, did you describe that?

A. Oh, yes, I did.

Q. Did Mr. Consolo tell you at that time whether Mr. Adir or Banana Distributors was his agent?

A. I don't recall but I assumed that considering that they both came in together.

Q. After this inquiry of space from Mr. Consolo in 1957, did you enter into any agreement with him for the carriage of bananas during the year?

A. 1957?

Q. Yes.

A. No.

Q. Did you hear anything further from him in 1957?

A. No, I don't believe I did.

Q. Your best recollection is that you met him once sometime in 1957 and you described the services to him?

A. Yes.

\* \* \* \* \*

[fol. 395] A. (Continuing) I believe I was too hasty in answering the latter part of your question. I see here that we made a tentative booking to Banana Distributors for the SS ANDELEAN.

Q. When was that, Mr. Champion?

A. That was June 13, 1957.

Q. Do you know whether that tentative booking which you made for the SS ANDELEAN on June 13, 1957, with Banana Distributors, was that before or after Mr. Consolo met with you in 1957, your best recollection?

A. My best recollection now is that it was after.

Q. It was after?

A. Yes. Incidentally, this shipment, according to my records, never materialized.

Q. That agreement that you had, was that for one voyage only?

A. Yes.

\* \* \* \* \*

Q. In 1958, Mr. Campion, will you please describe the Chilean Line service; that is the number of vessels involved, the frequency of the service and how long it took to come to New York; that is in 1958?

A. In 1958 the service was again changed whereby the vessels came from South America and they discharged and loaded at Baltimore, Philadelphia and New York. They did not stop at Havana nor did they go to Europe. On that basis it gave us a frequency of about fourteen days' service.

Q. Assuming these vessels with reefer capacity had loaded bananas in Guayaquil, how long would it have taken them to come to either Baltimore, Philadelphia or New York?

A. We estimated nine days.

\* \* \* \* \*

Q. In 1958, did you carry any bananas?

A. Yes, we did.

Q. Did you enter into any agreements with Mr. Consolo?

A. Yes. We carried four or five shipments for Mr. Consolo.

\* \* \* \* \*

Q. During the remainder of 1958, Mr. Campion, did Mr. Consolo request any additional space from the Chilean Line?

A. Yes, he was interested in some agreement whereby he could contract the space.

[fol. 396] Q. Was that in 1958?

A. Yes, while we were carrying his cargo.

Q. He spoke to you about entering into an agreement?

A. Yes.

Q. Did you discuss with him the terms of the agreement or anything of that sort?

A. No, because we had to clear that up with our principals first.

Q. Did he tell you how long an agreement he wanted?

A. He spoke in terms of eighteen months or two years.

Q. Did he ask you for all or part of the refrigerated space?

A. He asked for at least part of it and if possible all of it.

Q. Did you talk terms with him?

A. We indicated general terms, yes.

Q. Such as freight rates and things like that?

A. Yes.

Q. Did you come to any agreement with him in 1958 as to a booking arrangement with him?

A. No, we did not.

Q. Did you circularize the trade in 1958 for banana customers?

A. No, we didn't.

Q. You did not?

A. Not in 1958.

Q. During that time Mr. Consolo said he wanted an eighteen-month booking contract with the Chilean Line?

A. He was interested in getting regular space.

Q. Other than these five shipments in 1958, did you bring up any other bananas on the Chilean Line?

A. Yes, we had a few shipments on account for [Andes] Fruit & Produce, which ran into the Chilean fruit season.

Q. Into the Chilean fruit season?

A. Yes.

Q. Do you know how many bookings you had for [Andes] Fruit?

A. We had at least a few; I don't know offhand.

Q. Were they on the same type of letter agreement, substantially, as Exhibit 34?

A. Yes, basically.

Q. There was no long-term agreement with [Andes] Fruit?

A. No.

Q. Did they request a long-term agreement from you in 1958?

[fol. 397] A. Towards the latter part of the year, yes; they indicated a desire to contract space on an annual basis.

\* \* \* \* \*

Q. In 1959, up to October 1, 1959, could you describe, generally, the type of service which was offered by the Chilean Line, the frequency of arrivals at New York, and how long it would take if they loaded bananas at Guayaquil?

A. It was the same as 1958.

Q. The same as 1958?

A. Yes.

Q. In 1959, Mr. Campion, did you circularize the trade for banana shipments?

A. Yes, we did.

Q. How was that done, by letter or by telephone or how?

A. By letters.

\* \* \* \* \*

Q. In 1959, when, you say, you circularized at least a dozen prospective banana shippers, was that on the basis of individual booking agreements for each vessel or was that on a long-term basis?

A. Considering that we had a request for space from Mr. Consolo and [Andes] for space on an annual basis, we thought that it was wise to circularize the trade to make sure that according to the law we would be able to offer space to all interested parties. On that basis we sent circulars to all the shippers.

Q. Were those circulars that you sent to all the shippers a criterion, or letter, asking for their background and whether they had background, financial background, and experience in the banana business?

A. Yes, we sent a questionnaire in the form of a contract, to our requirements.

Q. In other words, Mr. Campion, you sent out to at least a dozen shippers a letter asking their background and a pro forma contract which the Chilean Line proposed to offer to the various shippers?

A. Yes.

Q. Do you know when was that done in 1959?

A. It was done around May or June of that year.

[fol. 398] The Examiner: He said he can remember a few names. Was Mr. Consolo one name that you remember?

The Witness: Yes.

By Mr. Giallorenzi:

Q. Was Mr. Consolo one of the persons to whom you addressed this questionnaire together with a form contract?

A. Yes.

• • • • •

Q. Did you receive any responses for the forward booking contract; did anybody answer you?

A. Yes, we received one from [Andes] Fruit.

Q. Did you receive any from Mr. Consolo?

A. We received a letter from Mr. Consolo to the effect that, I believe, he wanted to discuss the conditions and I recall that I answered his letter and told him that if he was interested in space, he would have to agree to those conditions that were in our questionnaire.

• • • • •

Cross examination.

By Mr. Kharasch:

• • • • •

Q. When Chilean fruit is available does your line prefer to put in the Chilean fruit rather than carry bananas from Ecuador?

A. I would say offhand, yes.

Q. Have you ever carried any bananas during the Chilean fruit season?

A. There may have been occasions.

Q. The only years that could have happened would be what years?



A. It is hard to say offhand. I believe that perhaps on occasions where maybe fruit was not available for certain vessels that might have happened but the general rule was that during the months of December through May the space was reserved for Chilean fruit.

\* \* \* \* \*

Q. Do they ship Chilean fruit on your line?

A. Yes, they do.

Q. Would you characterize them as a major shipper?

A. Yes.

Q. I think that either you or, perhaps, Mr. Giallorenzi made reference to the Grace Line carriage of Chilean fruit; are you at all familiar with that?

[fol. 399] A. I know that they carry fruit the same as we do.

Q. Do you know that the Grace Line preempts all the refrigerated space from Chile?

A. In conversations I have had with the Grace Line, they don't preempt all their space, there is space enough to take care of the Chilean fruit and bananas from Ecuador.

Q. But the Chilean Line takes all the space for Chilean fruit?

A. Yes; we don't have too much space.

Q. Do you have a copy of the contract with you that you said you sent around to the trade in 1959?

\* \* \* \* \*

Q. You indicated that in late 1955 the sailings averaged twenty-one days apart, is that right?

A. Yes, my recollection is that was about the average, more or less.

\* \* \* \* \*

Q. The fact of your operating chartered vessels did not help the frequency of your reefer arrivals?

A. No, because the charter vessel had no reefer space.

\* \* \* \* \*

Q. And in 1956 the average frequency with which your ships with reefer capabilities arrived was fourteen to sixteen days?

A. Yes.

Q. Is it true, in 1956, that every three months there would be a spread greater than fourteen to sixteen days because of the arrival of the chartered ship without reefer capability?

A. I believe that was the situation, yes.

Q. What was the minimum and maximum spread between the arrival dates of the reefer ships in 1957 in the United States?

A. Approximately every fourteen days.

Q. Is it not true that the Grace Line offered more frequent service for bananas from Guayaquil between 1955 and 1959 than your company?

A. I would say yes.

Q. Is it not true that Grancolombiana also offered more [fol. 400] frequent service during the same period?

A. Yes.

Q. In 1958, were you carrying some bananas on a voyage-to-voyage basis, is that correct?

A. Correct.

Q. And did you not carry Mr. Consolo's bananas on some consecutive voyages?

A. Yes.

Q. During the course of those voyages did he ask for additional space on later voyages?

A. Yes.

Q. Did you give him that space?

A. We gave him about, as I recall, five or six consecutive voyages at the same time we were getting requests from [Andes] Fruit for space; so we thought it was only fair to give [Andes] Fruit some space also.

Q. Then you cut off Mr. Consolo and took on [Andes] Fruit?

A. Yes, we gave Andes Fruit some voyages.

Q. How many?

A. I didn't get an opportunity to look that up, but I know that it went into December when the Chilean fruit season started.

Q. Am I correct, then, in my understanding that following the last of Mr. Consolo's shipments he wished to continue but he was not permitted to continue?

A. Correct.

\* \* \* \* \*

Q. Now, would you for convenience, read into the record Mr. Consolo's letter to you of June 29, 1959?

A. "I regret to write to you at this late date but I have been out of town and I received a registered letter on June 26th, six p.m., with reference to your inquiries. The only thing I can state at this time is that the Maritime Commission on two separate occasions, one with the Grace Line and one with Grancolombiana Line, has found me to be a qualified shipper of bananas from Ecuador to the United States and, also, you have found me to be a qualified shipper as I have shipped bananas on your line.

"With reference to any further information I think it is premature until you are ready to sign a contract and have established the freight rate."

Q. What is the meaning, in the last paragraph of Mr. [fol. 401] Consolo's letter, "until you have established a freight rate"; does that indicate that you had not filled a rate into the contract?

A. It would indicate that.

Q. In reply to Mr. Consolo—

A. (Interposing) I beg your pardon; I can see now. I recall now. We added here, "to be agreed" provided, of course, that he accepted all the other conditions.

Q. Mr. Consolo wrote a letter saying that you had not established a rate, is that right?

A. That is correct, that is what he says.

Q. Did you, in reply, tell Mr. Consolo what your rate was?

A. No, we didn't tell him the freight rate.

Q. Did you establish a rate; in your correspondence with Andes did you send them a contract with a rate in it?

A. My recollection is that we sent all the contracts out in the same manner to everyone concerned.

Q. Is it right that the contract which you sent out provided for preemption of space by Chilean fruit from December 1st to [April or May?]

A. That is right.

\* \* \* \* \*

Q. Let us go back for one moment to the end of 1958. Do you have before you, from Andes Fruit or Compania Frutera, offers or demands to ship on the voyages on which Mr. Consolo shipped?

A. Did we have demands from others?

Q. I am asking about Andes or Compania Frutera—let me restate the question: Mr. Consolo, we are agreed, shipped on five voyages in 1958.

A. Yes, right.

Q. I asked you if you had a demand from Andes Fruit or Compania Frutera to ship on those same five voyages.

A. Not on the same five voyages. I would say that, if my memory serves me correctly, after we made, perhaps, two or three voyages for Mr. Consolo, Andes Fruit approached us for some space also.

Q. And then, even though Mr. Consolo was interested in continuing to ship, you have the subsequent space to whom, to whom was it, to Andes?

A. To Andes.

\* \* \* \* \*

[fol. 402]

Hearing Room 705, 7th Floor  
45 Broadway  
New York, N. Y.  
May 12, 1960—9:30 a.m.

\* \* \* \* \*

SAMUEL G. STAFF having been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Will you please state your full name?

A. Samuel G. Staff.

Q. Mr. Staff, are you associated with Panama-Ecuador Shipping Corporation in any manner whatsoever?

A. I am.

Q. In what capacity are you associated with that company?

A. Secretary.

\* \* \* \* \*

Q. Yes. After signing this agreement of July 20, 1955, Exhibit 15, did you discuss the banana business with any person or firm who had been previously in it?

A. With many people.

\* \* \* \* \*

Q. Now among these people, the importers that you spoke to about the banana business, did you ever confer with Philip R. Consolo?

A. If Philip R. Consolo is Bobby Consolo, yes.

\* \* \* \* \*

Q. Did your company bid for space on the Grancolombiana ships when Grancolombiana offered space to be booked to the trade pursuant to an order of the Maritime Board?

A. After the last order of the Maritime Board?

Q. Yes.

A. No.

\* \* \* \* \*

Q. You have previously testified that you met one Philip R. Consolo, also known as Bobby Consolo. Can you tell us when, where, and under what circumstances, did you meet him?

A. In August of 1955, we opened an office for the purchase of bananas in Ecuador in a building known as the Sud Americana Building, an office building. In my desire [fol. 403] to know as many banana people as possible, I called on a Mr. Nebel who was the purchasing agent for, and in the employ of, I believe exclusively, for Consolo Brothers. In my conversation with Mr. Nebel, relative to the banana business in general and the purchase of bananas in particular, Mr. Nebel mentioned and suggested that when I return to New York, it would be a good thing for me to call Mr. Bobby Consolo, and he gave me the telephone numbers. Upon my return, I believe some time in September—perhaps several weeks had elapsed before I called Mr. Consolo and we had a very friendly conversation. Then Mr. Consolo asked me could he visit with me and I said, yes, and he came to my home at 300 Central Park West. During the course of our conversation, Mr. Consolo asked me about the terms of my contract with the Grancolombiana Line. I told him that I had a copy of the contract at my home and would be pleased to show it to him. He said, he'd be very, very happy to see it. I brought out the contract and showed it to Mr. Consolo.

. . . . .

Q. I am sorry to have interrupted you but will you go on from there?

A. That's all right. Mr. Consolo read the contract. He was very friendly and I am sure tried very hard to be helpful; and in reading over the contract, he said to me, "you have a bad contract." He said, "this same contract was offered to me even at a lower rate but I turned it down, and the reason I turned it down was that I asked them, meaning the Grancolombiana people, to stop at Jacksonville; number two, I told them that on these boats, the Manizales, the Quito, the Medellin, the Ibaque and the Cali, all of which are noted on the first page of

this contract, contained false freight rates since the [cube] indicated next to the names of each of these boats on this first page of the contract, were unuseable space for bananas." I said, I don't know about that. Other folks have shipped bananas on these boats and Grancolombiana says this is useable space. Well, he said, "you will find out that it cannot be used." And the other suggestion he made which was very helpful was that he thought that the time allowed in Buena Ventura on the northern trip carrying [fol. 404] bananas up, the number of hours which we had agreed to allow the boats to remain there to be loaded at Buena Ventura, was too long. There wasn't anything we could do about it. We had signed the contract and I remained with the information and Mr. Consolo left very friendly and very helpful.

\* \* \* \* \*

Q. Did he examine the entire contract as to rights and other provisions, particularly the 39 weeks and the 13 weeks differential in freight rate which Grancolombiana provided therein?

A. Yes. He said that we had, in that regard, good conditions; that is the 39 weeks at regular rate and the balance of the 13 weeks, the privilege of shipping only 70 percent of the cargo. He said that this was a good condition.

\* \* \* \* \*

Q. Were you subsequently awarded by Grancolombiana a second contract for a term of two years with an option for a third year, dated May 22, 1957?

A. We were.

\* \* \* \* \*

Q. What was the condition of the fruit coming out of Ecuador in the Spring of 1958?

A. In the Spring of 1958, a great many areas—not all of the areas—but a great many of them were damaged. A great many of the banana areas where the bananas were damaged by volcanic ash which erupted from volcanoes in

Ecuador and it played havoc with bananas. Bananas came up here in virtually an unsaleable condition.

Q. You were then one of the number of shippers on the Grace Line vessels?

A. That's right.

Q. Then as you say, because of the condition of the bananas, it played havoc with the importers here?

A. Yes.

Q. Do you know what steps, if any, were taken by the Grace Line importers in this connection?

A. If I may preface my answer, I will say that as I [fol. 405] told you before, this damage played havoc with everyone. We went to the Grancolombiana Line and told them that because of this damage we would be forced under our contract to invoke [the] force majeure clause which we did. However, one of the areas that we were getting bananas from, mainly Puerto Bolivar, that wasn't ash damage there. So Grancolombiana conceded and allowed us to bypass Guayaquil and just take bananas from Puerto Bolivar.

Q. Which is also Ecuador?

A. In Ecuador. As a result, instead of shipping up 13,000 stems a week, we were bringing 6,000 stems a week and they were charging us on a prorata basis. When the industry as a whole learned of this, a meeting of the importers who were then on the Grace Line was called and I attended such a meeting.

Q. Do you know who was present at the meeting and when and where it was called and where it was held?

A. I was called on the telephone by a Mr. Palitz and Mr. Palitz said that such a meeting was to be arranged and asked me where, if I had any suggestion where it could be held, and I selected my club which is the National Democratic Club and we met there.

Q. Do you know who was there, Mr. Staff?

A. I would say every principal importer with the exception of the United Fruit Company and the Standard Fruit since they did not ship on Grace. But every shipper on the Grace was there.



Q. Was Mr. Philip R. Consolo there?

A. Mr. Bobby Consolo was there. Mr. Joselow was there. Mr. Grossman was there from West Indies Fruit. Mr. Parver of El Morro who had a contract on there. A Mr. Valentino or some "tino" or Leventino who had a contract on there. The man from the south, Lovett was there; young Billy Lovett. Frutera Sud Americana was represented by Mr. Rivera—I don't know whether that is the right name, but Frutera was represented by Mr. Rivera. There wasn't anyone absent—let me put it that way—that had a contract with the Grace Line.

Q. What was discussed at that meeting that was held at the National Democratic Club?

\* \* \* \* \*

[fol. 406] A. It was the consensus of opinion that the importers or the shippers of the Grace Line needed help desperately while this condition, while the ash damage condition, lasted in Ecuador.

Q. Were any suggestions made, Mr. Staff, as to what type of help would be requested?

A. Yes. There was.

Q. What was the suggestion?

A. The suggestions were that there would be a lowering of the freight rate while this condition existed, the ash damage condition existed; the lowering of freight rate plus the right to bring in fewer bananas or less tonnage on these boats.

\* \* \* \* \*

Q. Do you know whether or not anyone in connection with this meeting visited the Grace people for the relief?

A. Yes. There was a committee appointed out of the group.

Q. Who constituted the committee?

A. The committee was composed of Mr. Consolo, Mr. Parver of El Morro Company and myself with Mr. Consolo to be the chairman, the spokesman, since he had a great deal more knowledge of the banana business, number one; and number two, since he had been dealing longer with

Grace than either of us, either of the other members of the committee.

Q. Did the committee of yourself, Mr. Consolo and Mr. Parver go to see the Grace Line?

A. Yes. We did.

Q. You did?

A. Yes. We called and learned that Mr. Magner was out of town but because of the urgency on our part and on the part of the industry, we were asked to come down and discuss this with a Mr. Wensel—I think his name was—a Vice President and Executive Vice President of the Grace Line. We went down—Mr. Consolo, Mr. Parver and myself and we met with Mr. Wensel. Mr. Consolo was the spokesman since he was the chairman and he related the situation as it existed. Mr. Wensel was very receptive but said that in the absence of Mr. Magner he could not make a decision since Mr. Magner was in charge and was more familiar with the banana operations but he said that our request would receive consideration.

\* \* \* \* \*

[fol. 407] Q. After the market took a radical turn for the better in Ecuadorian fruit in and about this period we are talking, did you have any further conversations with Mr. Consolo about space on the Grancolombiana and on the Grace Line vessels?

A. Mr. Consolo—of course, what I am about to say I have already reported to Grancolombiana. I presume you are asking me these questions out of some knowledge that you have of your own?

Q. Yes, about conversations with Grancolombiana, of my conversations.

A. Right. Mr. Consolo called me on the telephone.

Q. That is in a period of time after this meeting with the Grace Line people, the market turned for the better?

A. After the market had turned very good, Mr. Consolo called me on the telephone and asked me would I sell my space on the Grace Line, and I said, "Bobby, you know the Grace won't permit you to sell space on the Grace Line.

I couldn't transfer their space to you." He said, "don't you worry about that. If you agree to give up your space and sell me your space, I will arrange to take your space over." I said, "what will you give me for it?" He said, "\$5,000." So I laughed and said, "\$5,000." I said, "Bobby I'll tell you what I'll do with you. How many bananas are you and your brother carrying presently on Grace?" And he said, "a little more than 6,000 stems." I said, "O.K. I don't want any of your money. I will give you all of my space, approximately 13—it carried 13,500—stems on the Grancolombiana Line for your space which carries approximately 6,000 stems or thereabouts on the Grace Line in an even swap." He said "no, I am not interested in shipping on the Grancolombiana Line." But thinking that he might take me up, I went down to see Mr. Borrero—Dr. Diaz may be out of town—and I asked Mr. Borrero if he would, if Consolo wanted my space, whether he would allow it for this transfer and whether he would allow this transfer and release me, and he said, has Consolo asked you definitely if he wants the space? But I said, no. But I offered him all of the space. I would like to get on the Grace Line. Mr. Borrero said, you wait until he makes you a definite proposition and we'll consider it at that time. [fol. 408] Q. Was anything further done in that connection?

A. No.

\* \* \* \* \*

Cross examination.

By Mr. Lippman:

\* \* \* \* \*

Q. You also testified that you had certain discussions with Mr. Consolo, Philip R. Consolo?

A. In September of 1955, yes.

\* \* \* \* \*

Q. Was Mr. Consolo anxious to help you in your pending venture with Grancolombiana?

A. He appeared, yes.

Q. Did he in fact offer you any helpful advice?

A. Yes. He did.

Q. Mr. Staff, at this meeting you showed Mr. Consolo a copy of your Grancolombiana contract, is that right?

A. Yes.

Q. Is it your testimony that he criticized the contract in certain respects?

A. My testimony is that Mr. Consolo was very definite against certain rates in the contract plus the fact that the useable space in the contract, the useable cubeage, was misstated in the contract, and also the fact that they wouldn't stop at Jacksonville, and the contract held no appeal for him whatsoever. He also informed me that the rates offered to him were lower than I was paying under this contract.

Q. The contract that you showed him was the contract that Mr. Giallorenzi showed you, which is in evidence as Exhibit 15?

A. This contract here that is marked Exhibit 15 in front of me.

\* \* \* \* \*

Q. In the Spring of 1958, you were shipping both on Grancolombiana Line and on the Grace Line?

A. Yes. We were.

Q. You then went to the Grancolombiana Line and you told them about this condition of the fruit, of the Ecuadorian fruit, this volcanic ash condition?

A. Yes.

Q. They, in turn, allowed you certain concessions?

A. They allowed it because of their close contact with Ecuador. They had checked with their general manager down there, a Mr. Zevallos, and Mr. Zevallos corroborated [fol. 409] the fact that this condition existed and number two, we also told them that we had the right, under our contract, to invoke a force majeure.

Q. As a result of these discussions with Grancolombiana, they allowed you to load fruit in Port of Bolivar?

A. They allowed us to buy or rather by-pass what is known as the area at Guayaquil and the railroad area

where the damage was greater and load only in Port of Bolivar and charged us pro rata.

Q. In other words, they also allowed you to reduce your minimums in your contract?

A. Yes. They did.

Q. They allowed you to ship only 6,000 stems?

A. A minimum, I believe, of 6,000.

Q. A minimum of 6,000?

A. Yes.

Q. And the freight rates were reduced proportionately?

A. Yes.

\* \* \* \* \*

Q. I don't believe you have answered my question, Mr. Staff. Specifically, did the Grace Line ever grant you any concessions for this period of time covering the period of volcanic ash shipments?

\* \* \* \* \*

Examiner Robinson: I understand your point but you can answer the question. Did they give you any relief?

Mr. Giallorenzi: You can answer yes or no.

The Witness: No.

By Mr. Lippman:

Q. You never got any relief?

A. No.

Examiner Robinson: We understand the reason. We just want that answer that you got no relief.

A. We only went there, when we went to Grace, in good faith.

Examiner Robinson: We are not questioning that at the moment. It is just that they did nothing affirmatively to relieve you.

The Witness: That's right. It was held in abeyance until Mr. Magner came back.

[fol. 410] Examiner Robinson: But when Mr. Magner came back, he still didn't do anything for you?

The Witness: The crisis was over.

Examiner Robinson: That is not the answer. Did he or didn't he give you any relief?

Mr. Giallorenzi: He answered no.

\* \* \* \* \*

JACK FRIEDLANDER having been previously sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

\* \* \* \* \*

Q. Did you apply for space on the Grancolombiana vessels when the space was open pursuant to a Board order to shippers?

A. No. We did not.

Q. Did you receive an invitation?

A. We did receive an invitation but we did not bid.

\* \* \* \* \*

Q. When, for the first time, did you meet Mr. Consolo?

A. I met Mr. Consolo in the Fall of 1955 for the first time.

Q. Do you know where you met him?

A. I first met him with Mr. Staff, I believe.

Q. Where was that?

A. I believe we had luncheon at the National Democratic Club in New York.

Q. That was the first time you met?

A. Yes.

Q. Did you discuss at that time, that is the first time you met him, the terms of the Grancolombiana contract; that contract which was entered into by Messrs. Morey and Staff on July 20, 1955, Exhibit 15. This agreement that I have here?

A. Yes.

Mr. Kharasch: This is a lunch at the Democratic Club?

By Mr. Giallorenzi:

Q. Do you know whether that luncheon at the National [fol. 411] Democratic Club took place before or after Mr. Staff's meeting at his apartment, at Mr. Staff's apartment?

A. It took place after the meeting in Mr. Staff's apartment.

Q. It took place after that meeting in Mr. Staff's apartment?

A. Yes.

Q. Did Mr. Consolo, at this luncheon, discuss with you the terms of the Grancolombiana contract?

A. Yes. We did discuss the terms of the contract. Specifically, there were three basic things that we discussed—the amount of cube that was mentioned on each of the vessels that were named in the contract; the calling port, the unloading port was discussed and the rate was discussed. Mr. Consolo said that he had an opportunity of making a more advantageous contract with Grancolombiana on rate per vessel. He also said that in all of the lower holds of these vessels there was a large amount of cubeage that could not be used because of the high deck, height and the lower holds, and that he didn't believe that Philadelphia was a good place to arrive with these bananas; that actually it would be much better market-wise if the bananas were unloaded at Jacksonville.

Q. Did you hear Mr. Staff testify to certain meetings which were held by the Grace Line shippers in connection with this thing which had occurred?

A. Yes. I also attended these meetings.

Examiner Robinson: Do you have anything further to add to what Mr. Staff said on that or do you corroborate what Mr. Staff said?

The Witness: I corroborated exactly what Mr. Staff said. I do know that Mr. Joselow took a much firmer stand at the second meeting and agreed to send a wire to the

Grace Line under his own signature requesting immediate aid from this blight situation in Ecuador.

. . . . .

By Mr. Giallorenzi:

Q. During this period of time, Mr. Friedlander, do you [fol. 412] know whether any of the shippers aboard the Grace Line relinquished their space?

A. Yes. I think there were three shippers that relinquished their space, Leventino, El Morro and Swanee Steamship.

Q. Was there any talk at these two meetings which you testified to, about any shippers giving up their space to Standard Fruit?

A. Yes.

. . . . .

Q. Mr. Friedlander, at these meetings was anything said about giving up space of the Grace Line vessels by the shippers to the Standard Fruit Company?

A. Mr. Lovett who was a shipper on the Grace Line was also very close to the Standard Fruit Company. His companies chartered on different occasions banana vessels to Standard Fruit Company and he had received a proposal from Standard that they wished to reduce their shipments to New York because of this blight situation, before mentioned, in Ecuador and if they could get part of the space on the Grace Line vessels, about 15,000 stems worth, they would eliminate one of their Ecuador vessels to New York which would alleviate the space problem. Mr. Lovett came up to give the other Grace Line shippers this information and everybody, all of the shippers who were at the meeting, agreed to reduce their allocations of space on the Grace Line to give the amount of cubeage for 15,000 stems to Standard. A proposal was made to the Grace Line and just as this was happening, the market changed.

Q. It took a turn for better, which Mr. Staff told us about?

A. That's right.



Q. Do you know the names of the shippers, other than those that got off, that agreed to give up part of their space to the Standard Fruit Company?

A. Consolo Banana Distributors; Joselow; ourselves; Swanee; El Morro; Leventino; Frutera Sud Americana.

Examiner Robinson: What is the general agreement on that?

By Mr. Giallorenzi:

Q. In other words, all the remaining ones agreed to give up part of their space?

A. Yes.

[fol. 413] Q. Did you have any conversation with Mr. Consolo with reference to trading his Grace Line space for the Grancolombiana space?

A. I was at the meeting that Mr. Staff talked about where Mr. Staff offered him all of our space on the Grancolombiana in exchange for his 6,000 some odd stems on the Grace Liners. As a matter of fact, it was at my suggestion that the proposal was made.

Q. In other words, you told Mr. Staff to offer to Mr. Consolo your Grancolombiana space in return for it, Mr. Consolo's Grace Line space?

A. That is correct.

Q. Why were you willing to give up 13,500 stems for 6,000?

A. I figured and all my testimony in the other hearings will bear that out, I considered them superior banana carriers operating on a more reliable schedule.

Q. That is the reason you were willing to give up this space for a smaller amount of cubeage?

A. That's correct.

\* \* \* \* \*

By Mr. Giallorenzi:

Q. I will withdraw the question. Mr. Friedlander, were you present when Mr. Staff talked to Mr. Borrero about swapping Grancolombiana space with Mr. Consolo?

A. I was.

Q. Do you recall where that conversation took place?

A. It was in the office of Grancolombiana. We went to see—we were actually looking to see—Mr. Diaz who was the general manager. But he was out of the country and we thought we could expedite the matter by seeing Mr. Borrero.

Q. What was said at the conference?

A. Mr. Staff was very anxious to pursue this swap of space, hoping to do a selling job on Consolo because Consolo hadn't protested too much, rather hadn't professed too much interest in this swap of space. But he wanted to see what Grancolombiana's attitude would be, if we could pursue the matter further; and Mr. Borrero said there was no point in taking any active steps until we could see whether or not we could make a deal with Consolo on such a swap.

[fol. 414] Q. Was anything further done in connection with this swap of space?

A. I saw Mr. Consolo at the piers in New York several times shortly after the original meeting and I believe, not that I believe I know it, that I believe I know that Mr. Staff spoke to Consolo several times after this original meeting trying to negotiate this transfer of Consolo space if he wasn't interested in making the exchange.

Q. You say that the matter then died?

A. The matter then died.

Q. Do you recall ever seeing Mr. Consolo and Mr. Palitz of Banana Distributors on a Grace Line pier during the unloading of bananas on occasion or on several occasions?

\* \* \* \* \*

Q. Mr. Friedlander, do you recall an occasion during the unloading of a Grace Line vessel having seen Mr. Consolo and Mr. Palitz on the pier?

A. There were many, many times I saw them both on the pier during the unloading operations.

Q. Do you recall seeing both Mr. Palitz and Mr. Consolo together during one of these unloading operations, sub-

sequent to the time when Banana Distributors filed a complaint for reparations against Grancolombiana?

A. Yes. I do.

Q. Can you tell us in your own words what was said at that meeting between yourself, Mr. Consolo and Mr. Palitz, subsequent or immediately after Mr. Palitz on behalf of Banana Distributors filed a complaint against Grancolombiana? Please keep your voice up.

A. As I recall the incident, they, both Mr. Consolo and Mr. Palitz, in a very friendly way took great delight in needling me on these unloading operations in a friendly way. On this occasion, they talked about the fact that they had filed this suit with the Maritime Board against Grancolombiana to prove that Grancolombiana was a common carrier, and they were going to get us off the vessels, and we wouldn't be in the business any longer, and I was quite provoked and said, "well, that is wonderful. I hope you go ahead with your case. I hope you win the case. I hope you get the Grancolombiana space and have your [fol. 415] trials and tribulations in operating that space and further, I also hoped that the market degenerates in position so that you will both lose your shirts". The reply from both of them almost instantaneously was, "who in the world is interested in the space? We are only interested in getting money out of the damages from Grancolombiana."

Q. Did you have further conversations on that date with these two gentlemen in connection with their claim for damages against Grancolombiana?

A. It was a constant needling process on almost any unloading where they were both present and I was present.

Q. Mr. Friedlander, when you were shipping bananas on the Grancolombiana vessels, could you tell us in what states or cities generally, that you sold your fruit?

A. We sold our fruit west, pretty well as far as Illinois, the State of Illinois; north, into Canada with the exception of New England and the local New York market and in New Jersey, upper New Jersey we didn't sell; and south as far as possibly the State of North Carolina and west, Virginia. That kind of is the boundary line.

Q. Do you know generally how many jobbers in this territory you sold bananas to?

A. We sold to or how many jobbers there were?

Q. How many did you sell to?

A. We sold approximately to 50 or 40 jobbers.

Q. Out of these 40 or 50, did you have regular customers that would come back to you consistently?

A. I would say that about 90 to 95 percent of the customers were the same every week.

Q. What percentage of your sales did these 90 to 95 take?

A. 90 percent.

Q. In the same territory that you have described which you sold to while carrying bananas on Grancolombiana vessels, did you have any idea from how many jobbers in toto there were during this time?

A. I believe there would be between 700 and 800 jobbers.

Q. Did the other importers, both the independents and the large companies as United Fruit and Standard Fruit, also sell bananas in this very same territory?

[fol. 416] A. Most of the bananas in that territory, the great overwhelming part, was sold by United Fruit and Standard Fruit.

Q. These jobbers which you have described, which you were selling to, 40 to 50, do you know whether they also bought from other independents?

A. Only a very small percentage bought from other independents and then generally only when Standard and United were in very short supply.

Q. Did you look to United and Standard for their supplies for the jobbers which you sold to?

A. That's correct.

Q. Did you make it a practice not to sell jobbers who were buying from independent importers where possible?

A. We have always made it a practice of trying to sell all of our fruit to Standard and United customers, jobbers who buy from independents, other independents such as ourselves. We found ourself pretty well locked in the competitive position, we would then try to avoid that type of account.

Q. Can you tell us why you made it a practice, wherever possible, to not sell to the jobbers who were buying from independent importers?

A. We could always get a better price from competition against Standard and United than we could from the jobbers who were buying from other independents.

Q. As a result of having this space on the Grancolombiana vessels, were you able to obtain as customers any jobbers from whom Consolo was a distributor, that is Dixon?

A. You mean the company who distributed Consolo's fruit?

Q. Yes. Did you prevent Consolo distributors from obtaining customers?

A. No, sir.

Q. At the last hearing as part of this series of hearings, Mr. Meyer who was the President of R. Dixon, testified that his company was not in competition with Panama Ecuador. Do you agree with that statement?

A. Basically, that is a true statement, yes. That was at the time we were shipping on Grancolombiana?

Q. Yes.

A. Yes.

[fol. 417] Q. I should have prefaced those questions by saying that all of those questions dealt with the time that you were shipping aboard the Grancolombiana vessels?

A. Yes.

Q. And if I had said that, would your answers have been the same?

A. That is correct.

Q. You have testified that you are no longer shipping aboard Grancolombiana vessels, is that correct?

A. Yes.

Q. You have your own tonnage that you are now using?

A. We have our own chartered vessels.

Q. You operate charter vessels now?

A. Yes.

Q. To carry bananas from Ecuador to New York?

A. That's correct.

Q. Since your company gave up space on Grancolombiana, have you continued to sell to the same customers as when you were on the Grancolombiana vessels?

A. We have all of the customers that we sold to previously, yes.

Q. How about the quantity, do you sell the same quantity as you did before?

A. We sell in proportion naturally more.

Q. You sell proportionally more?

A. Yes, possibly 100 percent more.

Q. How many bananas do you now import per week, Mr. Friedlander, on these chartered vessels?

A. Approximately 45 to 50,000 stems per week.

Q. What were you averaging on the Grancolombiana?

A. As I said, we averaged between 12 and 13.

. . . . .

Cross examination.

By Mr. Kharasch:

. . . . .

Q. You also testified that at some meeting the independent banana importers wanted to give up some space so that Standard Fruit would give up a sailing, is that right?

A. Would give up one of their own chartered vessels [fol. 418] that loaded fruit in Guayaquil and discharged in New York.

Q. In other words, the idea was to lessen the amount of bananas coming into New York market?

A. That is correct, lessen the amount of bananas and particularly, the bad bananas.

. . . . .

Q. You said you offered the Grancolombiana space to Mr. Consolo in return for his space on the Grace Line. Did you make that proposition in writing?

A. No, sir. But it was a very serious proposal.

Q. At the time you made that proposal, Mr. Friedlander, was Mr. Consolo's complaint then pending before the Maritime Board against Grancolombiana?

A. I can place the time we made the proposal. This was about May or June of 1958. Was the complaint pending at that time?

Mr. Giallorenzi: As a matter of record, the complaint was pending from November 15, 1957.

By Mr. Kharasch:

Q. Did you or your company ever offer a portion of Grancolombiana space to Consolo without demanding that he give up some space to you?

A. No. We didn't offer any space to him but we offered to take him in as a partner on several occasions. On more than one occasion, at least three or four, though I can't remember very distinctly.

Q. Since the complaint was pending, did you notify Grancolombiana that you were willing to give up part of your space to Consolo?

A. We never offered to give part of your space to Consolo. We offered, either to take him in as a partner or we offered to swap our space for space on the Grace for our space on the Grancolombiana.

Q. But you did not offer him any portion of your space on Grancolombiana?

A. We never discussed dividing the space with him on his own. We always discussed a partnership. He never expressed any interest to us in wanting a part of this space.

\* \* \* \* \*

[fol. 419] Examiner Robinson: Mr. Friedlander, let me ask you just a couple of innocuous questions. They don't involve your company in any way. You needn't worry about it. You say you are at present chartering a ship. Are you the sole shipper?

The Witness: Yes, sir. We are.

Examiner Robinson: What is the approximate cubeage of that, refrigerator space?

The Witness: We have two of the ships that have 225,000 cube and one of the ships has 240 cube.

Examiner Robinson: They are good sized ships?

The Witness: Yes.

Examiner Robinson: They are foreign flag ships?

The Witness: One is a Danish; one is a Norwegian and one is German.

Examiner Robinson: You are the sole shipper on them?

The Witness: Yes, sir. The sole shippers.

• • • • •

[fol. 421] LOUIS GROSSMAN having been duly sworn testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Grossman, are you here or have you come here pursuant to a subpoena which I had served upon you?

A. Yes, sir.

• • • • •

Q. Will you please tell us what, with what company you are now associated?

A. West Indies Fruit Company.

Q. Where is the head office?

A. In Miami, Florida.

Q. What position do you have in that company, Mr. Grossman?

A. I am a partner in the firm.

Q. Are you an officer of the company also?

A. I am President of the Company.

Q. What kind of business is the West Indies Fruit Company engaged in at the present time?

A. Importing bananas from South America and Mexico and the Dominican Republic.

Q. Colombia also?

A. Colombia, that is South America.

Q. How long has the West Indies Fruit Company been engaged in this type of business, Mr. Grossman?



A. Close to 15 years.

Q. How long have you been engaged in the banana trade [fol. 422] or banana business, the importation of bananas?

A. Thirteen years.

\* \* \* \* \*

Q. In addition to having bananas imported by the West Indies Fruit Company on these two liner services which you have described, has your company from July of 1955 up to October 1, 1959, chartered vessels?

A. Yes. We have.

Q. Do you do the chartering of vessels for your company?

A. Yes. I do.

Q. Do you keep in touch with the chartering services as to the availability of tonnage?

A. Regularly.

Q. Mr. Grossman, can you tell us, from July of 1955 to September of 1959 whether or not in your opinion, there was available reefer tonnage suitable for carrying bananas from Guayaquil to United States ports of about 45 to 65,000 cubic feet?

A. Yes. There was.

Q. Did your company, during this period of time, charter any vessels about that size for the purpose of carrying bananas?

A. Yes. We did.

Q. Can you tell us whether those boats were used in the Ecuador Gulf trade which you deal in?

A. Yes. They were.

Q. Am I correct in stating that these vessels were chartered by you at the same time that you were carrying bananas in a liner service?

A. Yes.

Mr. Lippman: Which Liner service. I want the record clear.

By Mr. Giallorenzi:

Q. Which Liner service, Mr. Grossman?

A. We started with Grace Line in 1957 and we started with Grancolombiana in 1957, and we chartered vessels from that time on to come into the Gulf.

Q. How many vessels would you say your company has chartered for the carriage of bananas during this period of time from July of 1955 to September 1, 1959?

A. I don't remember exactly but there are a good number of them.

[fol. 423] Q. Could you give us an approximation?

A. Around fifteen.

Q. Fifteen?

A. Yes, around.

Q. Do you know whether they were charter or trip charters or long term basis?

A. Most of them were on a long term basis.

Q. How long would those charters last, Mr. Grossman?

A. Generally speaking, one year.

Q. Did you at any time have difficulty in chartering this type of tonnage?

A. No.

Q. What size tonnage did you charter in connection with your Guayaquil - Gulf service or Gulf ports where you operate principally?

A. They range anywhere from 34,000 cubic up to, mostly up to 80-90,000 cubic. Occasionally, we take on a 200,000 cubic vessel.

Q. Would you say that the majority of your chartered ships were between 30 to 80,000 cubic feet?

A. Yes.

Q. Do you know—you operated those vessels carrying bananas, is that correct, Mr. Grossman?

A. Yes, sir.

Q. And you operated them from Guayaquil to the United States Gulf coast?

A. That's right.

• • • • •

Q. Could you tell from the characteristics of these vessels whether some or all of them which you had chartered, could have come from Guayaquil to ports north of Hatteras?

• • • • •

A. Most of the ships had the ability of coming here to New York.

Q. Would you have chartered any of these vessels if you didn't consider them economically feasible for your trade?

A. No, sir.

• • • • •

Q. Do you recall coming to New York for a meeting of the Grace Line shippers in and about—between mid-March and mid-July of 1958?

A. Yes.

Q. Can you tell us where and when, if possible, this meeting was held?

A. A meeting was held, I think, at the local Democratic Club here in Manhattan.

[fol. 424] Q. Would that be the National Democratic Club?

A. Yes.

Mr. Giallorenzi: Off the record.

(A discussion was had off the record.)

By Mr. Giallorenzi:

Q. Mr. Grossman, do you know who was present at that meeting?

A. All the importers of any consequence on the Grace Line.

Q. Do you know whether Mr. Philip R. Consolo was present?

A. Yes. He was.

Q. Can you tell us briefly what was discussed at that meeting?

A. Generally speaking, we were all in the same difficulties. We needed relief in one fashion or another. We didn't know

how to go about it as far as Ecuador was concerned. It was something beyond our control. Being it was a disease, it was nothing we could do. But we thought we could go to our shipping line company, which was Grace in this instance, and ask for relief in either reducing the minimum or reducing our rate because of the way we were going at that time, we were all getting hurt badly. It was a question whether we were able to continue for a much longer period. There were also thoughts thrown out about asking the government or Ecuador for relief. No one seemed to agree that we would get relief from that source so we mutually agreed to go to Grace Lines and ask for help.

Q. Do you know who, if anyone on behalf of the independent shippers, went to the Grace Line?

A. We appointed a committee, if I recall, and I think Mr. Staff was appointed, Mr. Consolo.

Q. That's Philip Consolo?

A. Philip Consolo and Ted Parver. Those are the only three I recall, possibly one other one but I don't remember.

\* \* \* \* \*

Cross examination.

By Mr. Kharasch:

\* \* \* \* \*

Q. Is the record clear, that all of your charter ships are [fol. 425] brought to the United States Gulf from Ecuador?

A. Only in one instance, I think, we brought cargo into Norfolk; there might have been two instances.

Q. Was that because of a strike?

A. It was a bad period in the south and it was decided to come north.

\* \* \* \* \*

Q. What Gulf port do your bananas usually come into, is that New Orleans?

A. No. We come into Galveston, Texas; occasionally in Brownsville, Texas but Galveston for the most part.

Q. Isn't it a longer voyage to New York from Ecuador than it is to Brownsville or Galveston?

A. Is it a longer voyage to New York?

Q. Yes?

A. Oh yes.

Q. Can you give us an idea how much longer it is?

A. It would mean two or three more days.

Q. You said you had some 15 ships on charter. What was the greatest number you had at any one time on charter?

A. Not considering the liner service, 12.

Q. How many arrivals did that give you?

A. Too many.

Q. Of these 12, were they on long term charters or one voyage charters?

A. Most of them are on long term charters.

Q. By which you mean a year or longer?

A. No. I would say a year or lesser. They were not trip charters.

[fol. 426]

Room 4458  
New GAO Building  
Washington, D.C.  
Thursday, May 26, 1960

ALVARO DIAZ S. was called as a witness and, having been first duly sworn by Examiner Robinson, was examined and testified through interpreter as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Dr. Diaz, by whom are you presently employed?

A. The Grancolombiana Fleet.

Q. And how long have you been employed by Flota Mercante Grancolombiana?

A. Fourteen years.

Q. In what capacity have you been employed by Flota Mercante Grancolombiana during these past fourteen years?

A. As general manager, sir.

Q. Dr. Diaz, I show you Exhibit 15, an agreement entered into by Flota Mercante Grancolombiana on July 20, 1955, with Messrs. Morey and Staff, and ask you if that is your signature?

(Document handed to witness.)

A. It is sir.

Q. Dr. Diaz, are you familiar with the terms of this contract, Exhibit 15?

A. Yes.

Q. In the original negotiations of this agreement, Exhibit 15, did you participate in those negotiations?

A. Yes, I did.

Q. Prior to the expiration of contract dated July 20, 1955, Exhibit 15, did you on behalf of Grancolombiana ask interested shippers to submit their bids for the refrigerated space referred to in that contract?

A. I did, sir, through the New York office.

Q. And did you receive any bids in connection with the renewal of a contract, Exhibit 15, Dr. Diaz?

A. For the renewal of the contract?

[fol. 427] Q. Yes, for the renewal of the contract.

A. I did.

Q. Now I show you two letters dated January 14, 1957, and February 4, 1957, on the letterhead of Samuel G. Staff, and ask you if you received those letters?

(Documents handed to witness.)

A. I did.

. . . . .

Q. Dr. Diaz, I show you page 2 of Exhibit 25 and ask you if Flota received, in connection with the bids for the renewal of contract known as Exhibit 15, this bid from Philip R. Consolo?

(Document handed to witness.)

A. I only received this letter.

Q. Dr. Diaz, in addition to the bids received from Mr. Staff, Exhibits 119 and 120 for identification, and the bid received from Mr. Consolo, page 2 of Exhibit 25, did you receive any other bids?

A. I have.

Q. Was that bid from Mr. Noboa?

A. Yes, sir.

Q. Dr. Diaz, did the board of directors of Flota Mercante Grancolombiana consider these bids which were received for the space referred to in Exhibit 15?

A. Yes, sir.

\* \* \* \* \*

Q. And did the board of directors of Flota Mercante Grancolombiana, in considering these bids, hold meetings?

A. Yes, they did. Not only did they have meetings, but the matter was also considered in subcommittees as previous or prior study to submit the board of directors.

\* \* \* \* \*

Q. And at those meetings, was the offer of Mr. Consolo, contained in Exhibit 25, page 2, considered and passed upon?

(Document handed to witness.)

A. It was considered but not approved.

\* \* \* \* \*

Q. Can you tell us who was the successful bidder on the space?

A. The Ecuadorian Fruit Company represented by Mr. Staff.

[fol. 428] Q. Now I show you an agreement dated May 22, 1957, Exhibit 16, and ask you if that is your signature?

(Document handed to witness.)

A. It is.

Q. Again referring to Exhibit 16, can you tell us whether or not that was the contract entered into with Panama Ecuador Shipping Corporation based upon the authoriza-

tions which you received from the board of directors of Flota Mercante Grancolombiana?

A. Yes, it is.

\* \* \* \* \*

Q. Now, Dr. Diaz, you testified you were present at the board of directors' meetings in considering these offers which were made for the [renewal] of the previous contracts which were about to expire. Is that correct?

A. Yes, it is.

Q. And you testified, Dr. Diaz, that in considering these offers, not only did the board of directors consider them but also subcommittees considered them; is that correct?

A. Yes, sir.

Q. Now, in considering the offer of Philip Consolo at page 2, Exhibit 25, will you tell us on what basis this offer was considered by the subcommittees and the board of directors of Flota Mercante?

A. The explanation is very simple. These were considered under the same conditions as all contracts that go before the board; namely, 37-week contract with full tariff and 13-week contract with a discount, or reduced tariff, if I get it correctly.

Q. Dr. Diaz, you said 37 weeks at the full tariff. Do you mean that or do you mean 39 weeks at the full tariff?

The Interpreter: He means 39.

By Mr. Giallorenzi:

Q. So that in order to clarify the answer, it was the board of directors that considered the offer of Mr. Consolo based on 39 weeks at the full rate and 13 weeks at the reduced rate?

A. Thirty-nine and 13, as it considered other proposals. [fol. 429] Q. In other words, other proposals were considered on the same basis, the high season for 39 weeks and low season for 13 weeks?

A. Yes. That has been the custom ever since it has had banana contracts; that is the way in which it is considered under all circumstances.



Q. By that, you mean a certain period during the year with a lower rate and a certain period during the year with a higher rate; is that correct?

A. Yes, sir.

Q. And that is the manner in which you considered Mr. Consolo's officer?

A. Yes, sir.

Q. Now, Dr. Diaz, again referring to Mr. Consolo's offer, Exhibit 25, page 2, did you consider any other aspects of the offer which Mr. Consolo made to you?

When I say "you," I mean the board of directors.

A. This is a very interesting question, sir. When the board of directors studies a contract, it considers several aspects of it, which is of course natural, not only the aspect of price.

Now, in reference to your specific question, sir, the board of directors did not approve Mr. Consolo's contract. First, because its price was lower than the Ecuadorian Fruit. In the second place, because Mr. Consolo in his letter requested that the ports to which the bananas would be shipped would be left at his discretion. And for the fleet, that was an impossible thing because our itineraries would suffer considerably as a result. And so much so because I want to point out that our main business is not that of the transportation of bananas. Third point, because we had had before the year 1955, which was the date of the first contract with the Ecuadorian Fruit Company, we have had, as I say, much trouble and difficulties with the banana contracts that we had engaged in. And only in the case of the contract of 1955 with the Ecuadorian Fruit Company we had at that particular time of the two-year period, we had, as I say, a very good progress in the development of the contract. We had no difficulties or troubles whatsoever. [fol. 430] And consequently, the board of directors believed it very suitable, very convenient to extend the contract with the same person through whom such good results were achieved. And I believe that is a very normal factor in all business transactions in my country and in all parts of the world.

\* \* \* \* \*

A. Also with reference to Mr. Consolo's letter, it is stated that other details pertinent to the contract would be discussed later. And the board of directors considers that, in this sort of a contract, the details are extremely important—or not details, excuse me, but they are indeed important matters. And since we had other offers like the one of Mr. Staff, we didn't think that it would be advisable to wait and to discuss details that perhaps would never be fully solved, fully presented. And we might have lost the contract that we had in mind if we had given this much more time.

Q. Now with reference to the Consolo proposal in Exhibit 121, did you also use two years as a basis for this proposal?

A. Yes, despite the fact that the contract did not refer to two years.

Q. You mean Mr. Consolo's offer did not refer to two years?

A. That is right.

Q. Now, Dr. Diaz, can you tell us what difference, if any, did you find in the rates for the two-year period as proposed by Panama Ecuador and Mr. Consolo, as shown in Exhibit 121 for identification?

A. Approximately \$111,000.

Q. Who will pay that amount in excess if any?

You say it shows about \$111,000. Is that additional freight rate which would be paid by Panama Ecuador or by Consolo?

A. It would be what the Panama Ecuador Company would pay in excess.

Q. Of what Consolo was offering him to pay if he were awarded the contract?

A. Yes, sir.

[fol. 431] Q. Dr. Diaz, does Flota Mercante Grancolombiana have a specific itinerary for its vessels?

A. It does.

Q. And would Flota Mercante enter into a contract for the carriage of bananas where the discretion of the discharging ports in the North Atlantic would be left to the shipper?

A. No, sir.

Q. Why not?

A. In the first place, that would put an end to the itineraries of the Grand Fleet without which we would not be able to offer good service to those using the services of the Grand Fleet. And I repeat, sir, that the transportation of bananas is not the principal business carried out by the Grancolombiana Fleet. It is only a collateral activity. And if we had to keep in mind the desires of the banana shippers exclusively, we would cancel those contracts.

Q. In other words, it is your testimony, Dr. Diaz, that you always—and by you, I mean your company always wishes to reserve its right exclusively for the itinerary of the vessels?

A. Yes, sir. And for that reason, contracts before the year 1955 were canceled where the shippers requested that such-and-such ports be touched and the Grancolombiana Fleet cannot operate that way.

\* \* \* \* \*

Q. Now, Dr. Diaz, you will note that this letter which you sent is dated March 25, 1957, page 3 of Exhibit 25. And you will note that in this letter, you stated to Mr. Consolo that the offers contained in yours of March 6, which is page 2 of Exhibit 25, which we are here answering, are considered together with other proposals by the board of directors and by the general management of this company. Is that correct, Dr. Diaz?

(Document handed to witness.)

A. It is.

Q. Now, Dr. Diaz, will you explain that to us in the light of the fact that the board of directors on March 13, 1957,

Exhibit 18, awarded the contract to Panama Ecuador Company?

A. Would you please explain the question a little more, sir?

[fol. 432] Q. Yes. On March 25, 1957, you wrote Mr. Consolo that his offer was being considered; is that correct?

A. That's right, sir.

Q. Now, can you tell us why on March 25, 1957, you stated to Mr. Consolo that his offer was being considered when the board of directors on March 13, or twelve days before that, Exhibit 18, Minutes Number 482, had decided to award this contract to Panama Ecuador?

A. The reason is very simple. None of the actions of the board of directors has validity until the minutes of a particular business has been approved. Because on many occasions, on the occasion of minutes being approved, misunderstandings may arise or the need for explanation as to that reason, and it is for that reason until the minutes are approved in the following meeting, the general manager cannot communicate anything official in that respect.

Q. Well, I understand your testimony to be, Dr. Diaz, that it is necessary to ratify the board of directors' resolutions at a subsequent meeting?

A. Yes, sir.

Q. At a subsequent meeting of the board of directors?

A. Yes, sir.

Q. And was that done in connection with the minutes which were entered by the board of directors on March 13, 1957?

A. It certainly was. Like all minutes.

Q. Do you know what date the minutes of March 13th of the board of directors, March 13, 1957, were ratified?

A. I haven't the exact date, but I can assure you that it was subsequent to the twenty-fifth of March when I wrote to Mr. Consolo.

Q. Do you know whether you were present at the next board of directors' meeting after the letter of March 25th written to Mr. Consolo?

A. I was present a few days subsequent to the sending of this letter. I am not exactly sure of it.

. . . . .

[fol. 433] Q. Now, Dr. Diaz, again referring to Exhibit 25, I show you page 4 of that letter, of that exhibit, which is a letter addressed to Mr. Consolo, and ask you if you recognize the signature on that letter?

(Document handed to witness.)

A. It is that of the secretary general.

Q. That's Mr. Gutierrez?

A. Yes, Mr. Gutierrez.

Q. Now I show you a letter dated June 21, 1957, photostat of a letter, and ask you if you know whether that letter was sent to Mr. Noboa? Also it is dated June 21, 1957.

(Document handed to witness.)

A. Yes, sir.

. . . . .

Q. Now, Dr. Diaz, referring to Exhibit 122, letter of Dr. Gutierrez, dated June 21, 1957, is that similar to the letter Dr. Gutierrez sent to Mr. Consolo on the same date?

(Document handed to witness.)

A. Yes, it is, sir.

Q. Was Mr. Noboa the other unsuccessful bidder on the North Atlantic?

A. Yes, sir.

. . . . .

Mr. Kharasch: Mr. Examiner, at page 8 of the Board's decision in this case served July 2, 1959—

Examiner Robinson: You are talking about the mimeographed copy now?

Mr. Kharasch: That's right. I have just—

Examiner Robinson: I was thinking in terms of page number. It has since been printed.

Mr. Kharasch. This is the mimeographed copy.

The Board said, "It is clear from this record that both complainants are qualified banana shippers. It is similarly clear that they were denied reefer space accommodations by Flota to their prejudice and disadvantage and that Panama Ecuador, in receiving and using that space, was [fol. 434] favored and advantaged. We find no justification for this conduct on the part of Flota and conclude that in denying reefer space to complainants and in granting that space to a single favored shipper, Flota has acted in violation of Section 14(4) and 16 of the Act."

In the light of that finding on the common carrier phase of this case, we feel that all of Dr. Diaz's testimony this morning is subject to being stricken as an attempt to re-litigate a subject already decided by the Board. His testimony has been, generally speaking, an excuse for the conduct of Flota during the period they were discriminating against our client.

We would like at this point to move to strike the testimony of Dr. Diaz as irrelevant to any issue now before you.

It occurs to us that Dr. Diaz is here from out of town and we have some need to speed up the proceedings. If you desire, we are willing to argue that point in our brief rather than take up time this morning on the argument.

Examiner Robinson: I don't think there need be any argument because if you want a ruling now, I will give it to you now.

Mr. Kharasch: All right, sir.

Examiner Robinson: You want it?

I deny your motion to strike.

• • • • •

Cross examination.

By Mr. Kharasch:

• • • • •

Q. In the year 1957, or in the year 1958, or in the year 1959, prior to the decision of the Federal Maritime Board in this case, did Flota ever tell Mr. Consolo what its rates and condition of carriage for bananas would be?

A. It did not indicate it because since these were private bids, the bidders would indicate their bids in the course of the conversations.

[fol. 435] The bids are offered without the others knowing what the bids are, obviously. It is a private matter.

Q. Your answer is not true as to Panama Ecuador, however; is that correct?

A. Yes, it is. I will give the reason why. Because Panama was not informed as to what the other bids were; namely, by Mr. Consolo and Mr. Noboa.

Q. Did not the contract call for informing Panama Ecuador of any bids made by other applicants?

A. Would you repeat the question, please?

Q. You have said that one bidder was not shown the other bidder's bid.

A. Yes.

Q. Is it not true that the contract, the earlier contract with Panama Ecuador, gave Panama Ecuador the right to meet any other bid?

Mr. Giallorenzi: The contract speaks for itself, Mr. Examiner.

Examiner Robinson: I think that's been agreed upon.

Mr. Giallorenzi: It's been agreed upon. And you only have to tell the other, Panama Ecuador, in the event their offer was inferior to the other ones which we received. That was our only obligation to them.

\* \* \* \* \*

[fol. 436]

## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 15

AGREEMENT entered into this 20th day of July, 1955, by and between FLOTA MERCANTE GRANCOLOMBIANA S.A., a Colombian corporation with its principal place of business in the City of Bogota, Republic of Colombia, S. A. (hereinafter called "GRANCOLOMBIANA"), acting herein through its duly authorized Agent, the North American Division of TRANSPORTADORA GRANCOLOMBIANA, LTDA., a Colombian limited liability company authorized to do business in the State of New York, U.S.A., having its office at 52 Wall Street, New York, New York, and Mr. LEONARD MOREY, of 383 Lafayette Street, New York, New York and SAMUEL G. STAFF, of 415 Fifth Avenue, New York, New York, (hereinafter jointly called "LESSEE").

\* \* \* \* \*

Any additional time over and above the corresponding loading periods for each vessel that LESSEE may require for loading the vessel and that GRANCOLOMBIANA may grant to LESSEE will be paid by LESSEE to GRANCO-

\$75—

LOMBIANA at the rate of U. S. ~~\$100.00~~ per hour or fraction thereof.

\* \* \* \* \*



## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 16

THIS AGREEMENT made and entered into this 22nd day of May, 1957, by and between FLOTA MERCANTE GRANCOLOMBIANA S.A., a Colombian corporation, with its principal place of business in the City of Bogota, Republic of Colombia, South America, hereinafter called "GRANCOLOMBIANA", acting through its duly authorized agent, the North American Division of TRANSPORTADORA GRANCOLOMBIANA LTDA., a Colombian Limited Liability Corporation, authorized to do business in the State of New York, U. S. A., having its office at 52 Wall Street, New York, New York, and PANAMA ECUADOR SHIPPING CORPORATION, a Panamanian corporation with its principal place of business in the City of Panama, Republic of Panama, hereinafter called "LESSEE"

\* \* \* \* \*

[fol. 437] 6. In the event that Grancolombiana shall increase the rate of hire during the third year of this agreement over and above the rate of hire hereinabove stated in Paragraph 2 for the said third year, the Lessee shall have the right to cancel this agreement during the third year hereof, provided that the Lessee notifies Grancolombiana, in writing, by registered mail, of such cancellation within thirty (30) days after receipt of notification of the increased rate of hire.

\* \* \* \* \*

## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 20

GM-09808

New York, June 19, 1958

Panama Ecuador Shipping Corp.  
22 East 44th Street  
New York 3, New York  
*Attention: Mr. Jack Friedlander*

Gentlemen:

We herein confirm agreement reached with you through conversations held in our offices between the undersigning General Manager of Flota Mercante Grancolombiana and your Mr. Staff, Mr. Morey and Mr. Friedlander, regarding the utilization and hire of the refrigerated chambers of the vessels in the run Guyaquil/Philadelphia in relation to the standing agreement signed between Panama Ecuador Shipping Corp. and Flota Mercante Grancolombiana.

For the sailings from Ecuador following the one made by the "CIUDAD DE TUNJA" on June 3rd, with which the 10 weeks of special rates granted you by Flota Mercante Grancolombiana, as indicated in our letters ACC-06592 of April 28th and GM-07473 of May 13th expire, up to the one that will be made by the "MANUEL MEJIA" on or about June 23rd, the above special rates or conditions were extended as follows:

[fol. 438] For the "CIUDAD DE MEDELLIN" that sailed from Ecuador on June 9th and the "CIUDAD DE IBAGUE" that sailed on June 15th, a minimum hire of \$8,000.00 for loading up to 6,500 stems will apply, charging you at a rate of \$1.25 per each additional stem carried over the 6,500. For the "MANUEL MEJIA" scheduled to sail from Ecuador about June 23rd, a minimum hire of \$9,000.00 was agreed upon for loading up to 8,000 stems

with a charge of \$1.10 per each additional stem that be carried over the 8,000 stems mentioned.

All the other terms and conditions of the agreement as modified or confirmed in mentioned letters will remain in full force and effect.

In regard to the modifications that will take effect for the year starting on July 1, 1958 we have submitted same for the approval of the Board of Directors of Flota, and upon confirmation we shall prepare the necessary addendum to the standing contract for execution.

Your very truly,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

ALVARO DIAZ S.  
General Manager

JJB:dp

cc: Comptroller  
Claims

## EXHIBIT No. 41

## CONSOLIDA BANANA PURCHASE AND SALE EXPERIENCE

FMB Docket 827  
Exhibit 41  
Page 1 of 6

(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Consolidated Stems Shipped	(6) Cost in Suores	(7) Free Market Exchange Rate	(8) Cost in Dollars 1/	(9) Stems Out-Turn Count	(10) Out-Turn Weight (Pounds)	(11) Gross Sales (Dollars)	(12) Net Sales (Dollars)	(13) Profit Be- fore Stev. & Freight	(14) Profit per Stem Sold Before Stev. & Freight
147	Santa Isabel	11/4/55	11/14/55	4960	14,917.85	17.30	\$ 9,612.15	4923	351,920	\$19,307.76	\$18,008.83	\$ 8,396.68	\$1.706
148	Santa Ines	11/7/55	11/17/55	5760	169,247.23	17.30	10,931.75	5675	377,735	18,819.99	17,692.51	6,760.76	1.191
149	Santa Luisa	11/11/55	11/21/55	5250	157,088.14	17.30	10,127.20	5181	384,830	21,756.90	20,770.46	10,643.26	2.054
150	Santa Cecelia	11/19/55	11/28/55	5000	150,393.98	17.30	9,690.40	4971	362,800	19,718.51	17,945.39	8,254.99	1.661
151	Santa Maria	11/25/55	12/5/55	4120	124,353.04	17.30	8,009.66	4039	291,410	13,562.46	11,998.88	3,989.22	.988
152	Santa Olivia	11/26/55	12/7/55	6410	193,887.06	17.30	12,485.64	6164	428,455	14,994.12	14,046.91	1,561.27	.253
153	Santa Margarita	12/2/55	12/12/55	4050	127,345.45	17.35	8,162.63	3929	302,090	14,181.80	13,512.50	5,349.87	1.362
154	Santa Barbara	12/9/55	12/19/55	2260	74,835.02	17.35	4,772.42	2222	173,940	8,218.15	6,831.42	2,059.00	.927
155	Santa Isabel	12/16/55	12/27/55	3870	118,726.38	17.35	7,629.29	3832	310,290	13,758.46	11,937.19	4,307.90	1.124
156	Santa Luisa	12/24/55	1/3/56	4200	121,465.19	17.35	7,854.19	4133	342,790	17,341.20	15,844.68	7,990.49	1.933
157	Santa Ines	12/26/55	1/5/56	3080	94,158.05	17.35	6,052.74	2997	247,570	13,511.48	12,880.23	6,827.49	2.278
158	Santa Cecelia	1/1/56	1/12/56	3820	115,417.83	17.39	7,424.53	3737	311,400	20,308.76	18,734.01	11,309.48	3.026
159	Santa Maria	1/7/56	1/17/56	4240	128,774.07	17.39	8,279.15	4152	349,020	24,376.60	23,013.52	14,734.37	3.549
160	Santa Margarita	1/13/56	1/23/56	4490	131,636.30	17.39	8,495.28	4452	388,855	27,757.26	26,570.06	18,074.78	4.060
161	Santa Olivia	1/15/56	1/25/56	5040	152,923.40	17.39	9,832.77	4901	412,250	29,764.38	29,006.97	19,174.20	3.912
162	Santa Barbara	1/20/56	1/30/56	3950	119,137.80	17.39	7,665.24	3840	321,640	23,541.90	22,656.01	14,990.77	3.904
163	Santa Isabel	1/27/56	2/6/56	4200	128,765.89	17.39	8,270.44	4112	344,150	24,918.39	23,656.40	15,385.96	3.742
164	Santa Luisa	2/3/56	2/13/56	4970	153,034.00	17.55	9,803.09	4910	384,110	27,361.13	26,210.45	16,407.36	3.342
165	Santa Rita	2/5/56	2/15/56	4360	133,806.86	17.55	8,574.58	4227	314,470	21,927.55	20,954.89	12,380.31	2.929
166	Santa Ines	2/11/56	2/23/56	6680	213,318.11	17.55	13,610.78	6414	502,820	29,167.94	27,134.54	13,523.76	2.108
167	Santa Cecelia	2/12/56	2/21/56	4750	146,990.28	17.55	9,410.77	4686	352,820	24,184.75	22,627.14	13,216.37	2.820
168	Santa Maria	2/17/56	2/27/56	3670	114,902.60	17.55	7,347.03	3617	289,990	18,778.90	17,447.36	10,100.33	2.792
169	Santa Margarita	2/24/56	3/5/56	5130	159,395.63	17.55	10,200.45	5030	396,810	22,586.80	21,299.16	11,098.71	2.207
170	Santa Barbara	3/2/56	3/12/56	5090	160,046.28	17.66	10,212.65	4993	395,130	19,758.00	18,312.64	8,099.99	1.622
171	Santa Olivia	3/5/56	3/15/56	5620	172,064.12	17.66	11,012.91	5576	429,765	18,392.81	16,967.34	5,954.43	1.068
172	Santa Isabel	3/10/56	3/20/56	4810	152,874.37	17.66	9,743.28	4715	391,580	16,904.70	15,329.51	5,586.23	1.185
173	Santa Luisa	3/16/56	3/26/56	4060	128,252.46	17.66	8,179.61	3983	325,010	16,298.49	14,787.73	6,608.12	1.659
174	Santa Cecelia	3/24/56	4/3/56	4290	134,861.47	17.66	8,605.81	4152	354,340	17,187.50	15,862.31	7,256.50	1.748
175	Santa Rita	3/25/56	4/5/56	2060	68,529.79	17.66	4,345.93	2069	174,035	8,024.16	7,421.65	3,075.72	1.487
176	Santa Maria	3/31/56	4/9/56	4570	144,692.29	17.66	9,225.74	4492	379,340	17,669.85	16,819.09	7,593.35	1.690

Notes: 1/ Free Market Rate applied to costs in excess of 22.50 Suores per stem; Official rate (15.00 Suores Per Dollar) Applied to First 22.50 Suores Per Stem.

CONSOLO BANANA PURCHASE AND SALE EXPERIENCE

(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Conso Stems Shipped	(9) Stems Out-Turn Count
	*	*	*	*	***
9	Santa Margarita	8/24/57	9/3/57	4317	4170
10	Santa Barbara	8/31/57	9/10/57	4710	4533
11	Santa Olivia	9/6/57	9/16/57	5346	5278
12	Santa Luisa	9/7/57	9/17/57	3851	3741
13	Santa Isabel	9/14/57	9/24/57	4744	4655
14	Santa Rita	9/20/57	9/30/57	4486	4299
15	Santa Cecelia	9/21/57	10/1/57	5036	4819
16	Santa Maria	9/27/57	10/9/57	4892	4829
17	Santa Elisa	10/4/57	10/14/57	5810	5701
18	Santa Margarita	10/5/57	10/15/57	4752	4693
19	Santa Ines	10/11/57	10/21/57	6132	6109
20	Santa Olivia	10/26/57	11/4/57	5405	5348
21	Santa Catalina	11/2/57	11/11/57	6520	6496
22	Santa Rita	11/12/57	11/21/57	5700	5551
23	Santa Teresa	11/16/57	11/25/57	5764	5602
24	Santa Elisa	11/23/57	12/3/57	6280	6254
25	Santa Ines	11/28/57	12/9/57	6466	6334
26	Santa Ana	12/7/57	12/16/57	5407	5348
27	Santa Olivia	12/14/57	12/23/57	5530	5409
28	Santa Catalina	12/21/57	12/30/57	4023	3980
29	Santa Rita	12/30/57	1/9/58	5526	5416
	*	*	*	*	***

## CONSULO BANANA PURCHASE AND SALE EXPERIENCE

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(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Consulo Stems Shipped	(6) Cost in Suores	(7) Free Market Exchange Rate	(8) Cost in Dollars 1/	(9) Stems Out-Turn Count	(10) Out-Turn Weight (Pounds)	(11) Gross Sales (Dollars)	(12) Net Sales (Dollars)	(13) Profit Be- fore Stev. & Freight	(14) Profit per Stem Sold Before Stev. & Freight
30	Santa Teresa	1/6/58	1/16/58	5038	158,683.57	16.32	\$10,334.49	4984	398,640	\$27,175.62	\$26,105.59	\$15,771.10	\$3.164
31	Santa Elisa	1/13/58	1/22/58	5844	178,328.80	16.32	11,636.02	5700	454,515	31,437.69	30,545.82	18,909.80	3.318
32	Santa Ines	1/20/58	1/29/58	6174	186,744.52	16.32	12,191.73	6169	485,840	33,212.34	31,533.97	19,342.24	3.135
33	Santa Ana	1/27/58	2/6/58	4943	161,254.64	16.32	10,480.50	4861	398,960	23,892.72	22,193.59	11,713.09	2.410
34	Santa Olivia	2/2/58	2/12/58	4762	151,761.99	16.30	9,880.23	4689	369,835	19,840.60	18,647.99	8,767.76	1.870
35	Santa Catalina	2/7/58	2/18/58	5828	185,332.43	16.30	12,067.30	5808	439,935	19,715.86	18,555.92	6,488.62	1.117
36	Santa Rita	2/17/58	2/26/58	5303	166,619.65	16.30	10,856.47	5186	404,625	19,732.73	18,388.21	7,531.74	1.452
37	Santa Elisa	3/3/58	3/13/58	5202	173,768.56	16.50	11,240.79	5166	406,580	25,753.47	23,142.39	11,901.60	2.304
38	Santa Ines	3/9/58	3/20/58	6138	197,363.91	16.50	12,798.45	6076	430,105	26,821.85	24,564.72	11,766.27	1.937
39	Santa Olivia	3/20/58	4/2/58	6173	193,200.73	16.50	12,550.91	6104	464,160	22,899.70	20,729.55	8,178.64	1.340
40	Santa Catalina	3/29/58	4/7/58	5902	188,140.85	16.50	12,207.29	5778	448,010	19,392.25	17,290.66	5,083.37	.880
41	Santa Rita	4/7/58	4/17/58	5800	186,691.68	17.00	12,005.39	5660	455,520	19,794.78	17,657.49	5,652.10	.999
42	Santa Elisa	4/22/58	5/1/58	4501	141,172.28	17.00	9,098.55	4408	382,510	22,195.83	21,285.91	12,187.36	2.765
43	Santa Ines	4/28/58	5/7/58	4631	124,690.22	17.00	8,151.95	4617	374,565	23,172.12	20,156.75	12,004.80	2.600
44	Santa Rita	5/10/58	5/21/58	5664	162,872.79	16.82	10,602.59	5421	438,900	20,908.32	19,561.16	8,958.57	1.653
45	Santa Olivia	5/16/58	5/26/58	5603	161,851.63	16.82	10,531.98	5453	432,930	17,362.51	15,645.46	5,113.48	.938
46	Santa Catalina	5/24/58	6/4/58	5470	152,594.51	16.82	9,960.02	5294	434,140	18,104.27	16,414.74	6,454.72	1.219
47	Santa Teresa	6/1/58	6/11/58	4013	113,378.10	16.65	7,406.02	3945	327,535	17,262.64	15,864.30	8,458.28	2.144
48	Santa Rita	6/9/58	6/18/58	5330	149,384.73	16.65	9,764.35	5197	427,170	23,839.54	21,871.39	12,107.04	2.330
49	Santa Elisa	6/14/58	6/24/58	4975	139,069.38	16.65	9,092.04	4828	388,600	21,219.76	18,819.42	9,727.38	2.015
50	Santa Ines	6/21/58	7/1/58	5590	154,396.07	16.65	10,103.98	5216	411,280	20,205.46	18,642.29	8,538.31	1.637
51	Santa Olivia	6/29/58	7/8/58	5710	160,684.04	16.65	10,499.48	5504	444,110	21,820.01	20,128.01	9,628.53	1.749
52	Santa Catalina	7/15/58	7/24/58	5875	174,672.34	16.89	11,327.98	5706	459,895	41,252.92	38,077.57	26,749.69	4.688
53	Santa Ines	7/20/58	7/30/58	6110	184,393.20	16.89	11,542.87	6131	471,660	45,435.25	42,280.37	30,337.50	4.948
54	Santa Ana	7/29/58	8/7/58	4368	129,189.11	16.89	8,382.02	4133	316,525	22,076.01	20,208.76	11,826.74	2.862
55	Santa Rita	8/3/58	8/13/58	6500	209,521.57	16.89	13,446.10	6609	467,075	27,347.26	25,383.79	11,887.69	1.799
56	Santa Olivia	8/12/58	8/21/58	5709	184,198.38	16.89	11,864.03	5896	423,190	20,672.89	18,863.32	6,999.29	1.187
57	Santa Ines	8/17/58	8/28/58	5465	184,764.97	16.89	11,856.62	5497	379,320	15,988.28	15,130.73	3,274.11	.596
58	Santa Elisa	8/24/58	9/3/58	6315	199,201.05	16.89	12,448.76	6219	456,260	24,792.80	23,109.62	10,610.86	1.706
59	Santa Rita	8/31/58	9/10/58	5850	180,018.10	16.89	11,640.19	5899	430,340	30,463.02	28,196.12	16,555.93	2.807
60	Santa Ines	9/13/58	9/23/58	6130	187,201.18	16.90	12,110.75	6065	454,320	33,709.32	31,475.40	19,364.65	3.193
61	Santa Catalina	9/30/58						6193	454,860	38,793.42			

Notes: 1/ Free Market Rate applied to costs in excess of 22.50 Suores per stem; Official rate (15.00 Suores Per Dollar) Applied to First 22.50 Suores Per Stem.



## EXHIBIT No. 42

## COMPUTATION OF DAMAGES FOR EACH GRANCOLUMBIANA SAILING

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I n d e x	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Voy. No.	Ship Name	Date Sailed Guayaquil 1/	Date Arrived Phila- delphia	No. of Stems Aboard	Freight paid (Dollars)	Sailing Guay. Nearest Consolo Ship	Consolo Profit/Stem Before Stev. and Freight	Total Profit Before Stev. & Freight (5) x (8)	Total Stev. at 35¢/Stem (Est. Phila.) (5) x 35¢	Total Stev. at 48.8¢/Stem (N.Y.) (5) x 48.8¢	Net Profit at 35¢ Stev. (9)-(6)-(10)	1/3 Profit at 35¢ Stev. (12) ÷ 3	Net Profit at 48.8¢ Stev. (9)-(6)-(11)	1/3 Profit at 48.8¢ Stev. (14) ÷ 3
1	47-W	Medellin	11/5/55	11/15/55	12,100	\$13,000.00	11/4/55	\$1.706	\$20,642.60	\$4,235.00	\$5,904.80	\$3,407.60	\$1,135.86	\$1,737.80	\$ 579.26
2	61-N	Quito	11/16/55	11/27/55	9,000	10,000.00	11/19/55	1.661	14,949.00	3,150.00	4,392.00	1,799.00	599.66	557.00	185.66
3	22-W	Ibague	11/19/55	11/29/55	13,220	14,500.00	11/19/55	1.661	21,958.42	4,627.00	6,451.36	2,831.42	943.80	1,007.06	335.68
4	22-W	Cali	11/26/55	12/7/55	12,643	14,500.00	11/26/55	.253	3,196.68	4,425.05	6,169.78	(15,726.37)	(5,242.12)	(17,471.10)	(5,823.70)
5	75-W	Manizales	12/2/55	12/12/55	6,110	7,000.00	12/2/55	1.362	8,321.82	2,138.50	2,981.68	(816.68)	(272.22)	(1,659.86)	(553.28)
6	48-W	Medellin	12/10/55	12/21/55	8,160	8,160.00	12/9/55	.927	7,564.32	2,856.00	3,982.08	(3,451.68)	(1,150.56)	(4,577.76)	(1,525.92)
7	23-W	Ibague	12/26/55	1/9/56	8,912	9,300.00	12/26/55	2.278	20,301.54	3,119.20	4,349.06	7,882.34	2,627.44	6,652.48	2,217.49
8	23-W	Cali	1/4/56	1/15/56	8,446	9,300.00	1/1/56	3.026	25,557.60	2,956.10	4,121.65	13,301.50	4,433.83	12,135.95	4,045.31
9	76-W	Manizales	1/9/56	1/20/56	5,252	5,252.00	1/7/56	3.549	18,639.35	1,838.20	2,562.98	11,549.15	3,849.71	10,824.37	3,608.12
10	49-W	Medellin	1/16/56	1/26/56	11,895	13,000.00	1/15/56	3.912	46,533.24	4,163.25	5,804.76	29,369.99	9,789.99	27,728.48	9,242.82
11	63-W	Quito	1/23/56	2/2/56	8,857	10,000.00	1/20/56	3.904	34,577.73	3,099.95	4,322.22	21,477.78	7,159.26	20,255.51	6,751.83
12	24-W	Ibague	1/31/56	2/9/56	12,205	14,500.00	2/3/56	3.342	40,789.11	4,271.75	5,956.04	22,017.36	7,339.12	20,333.07	6,777.69
13	24-W	Cali	2/5/56	2/15/56	13,500	14,500.00	2/5/56	2.929	39,541.50	4,725.00	6,588.00	20,316.50	6,772.16	18,453.50	6,151.16
14	77-W	Manizales	2/12/56	2/23/56	6,141	7,000.00	2/12/56	2.820	17,317.62	2,149.35	2,996.81	8,168.27	2,722.75	7,320.81	2,440.27
15	50-W	Medellin	2/20/56	3/1/56	12,493	13,000.00	2/17/56	2.792	34,890.46	4,372.55	6,096.58	17,507.91	5,835.97	15,783.88	5,261.29
16	64-W	Quito	2/27/56	3/8/56	9,170	10,000.00	2/24/56	2.207	20,238.19	3,209.50	4,474.96	7,028.69	2,342.89	5,763.23	1,921.07
17	25-W	Ibague	3/5/56	3/15/56	12,150	14,500.00	3/5/56	1.068	12,976.20	4,252.50	5,929.20	(5,776.30)	(1,925.43)	(7,453.00)	(2,484.33)
18	25-W	Cali	3/11/56	3/22/56	13,430	14,500.00	3/10/56	1.185	15,914.55	4,700.50	6,553.84	(3,285.95)	(1,095.31)	(5,139.29)	(1,713.09)
19	78-W	Manizales	3/17/56	3/27/56	5,786	7,000.00	3/16/56	1.659	9,598.97	2,025.10	2,823.57	573.87	191.29	(244.60)	(74.86)
20	51-W	Medellin	3/23/56	4/3/56	10,086	13,000.00	3/24/56	1.748	17,630.33	3,530.10	4,921.97	1,100.23	366.74	(291.64)	(97.21)
21	26-W	Ibague	4/8/56	4/17/56	11,092	11,092.00	4/6/56	2.181	24,191.65	3,882.20	5,412.90	9,217.45	3,072.48	7,686.75	2,562.25
22	26-W	Cali	4/14/56	4/24/56	10,567	10,567.00	4/13/56	3.557	37,586.82	3,698.45	5,156.70	23,321.37	7,773.79	21,863.12	7,287.70
23	79-W	Manizales	4/22/56	5/2/56	4,900	7,000.00	4/20/56	3.807	18,654.30	1,715.00	2,391.20	9,939.30	3,313.10	9,263.10	3,087.70
24	52-W	Medellin	4/28/56	5/8/56	11,250	13,000.00	4/27/56	4.133	46,496.25	3,937.50	5,490.00	29,558.75	9,852.91	28,006.25	9,335.41
25	27-W	Ibague	5/6/56	5/17/56	10,020	14,500.00	5/5/56	4.191	41,993.82	3,507.00	4,889.76	23,986.82	7,995.60	22,604.06	7,534.68
26	66-W	Quito	5/14/56	5/24/56	7,831	10,000.00	5/11/56	3.894	30,493.91	2,740.85	3,821.53	17,753.06	5,917.68	16,672.38	5,557.46
27	27-W	Cali	5/19/56	5/29/56	9,011	14,500.00	5/18/56	3.690	33,250.59	3,153.85	4,397.37	15,596.74	5,198.91	14,353.22	4,784.40
28	80-W	Manizales	5/27/56	6/8/56	5,613	7,000.00	5/25/56	2.990	16,782.87	1,964.55	2,739.14	7,818.32	2,606.10	7,043.73	2,347.91
29	53-W	Medellin	6/3/56	6/12/56	8,521	13,000.00	6/2/56	2.303	19,623.86	2,982.35	4,158.25	3,641.51	1,213.83	2,465.61	821.87
30	28-W	Ibague	6/8/56	6/20/56	11,290	14,500.00	6/8/56	2.253	25,436.37	3,951.50	5,509.52	6,984.87	2,328.29	5,426.95	1,808.95
31	67-W	Quito	6/16/56	6/26/56	7,903	10,000.00	6/15/56	1.647	13,016.24	2,766.05	3,856.66	250.19	83.39	(840.42)	(280.14)
32	28-W	Cali	6/24/56	7/4/56	8,795	14,500.00	6/22/56	1.004	8,830.18	3,078.25	4,291.96	(8,748.07)	(2,916.02)	(9,961.78)	(3,320.59)

Notes: 1/ When vessel shifted to Puerto Bolivar and no Guayaquil sailing date appeared in Grancolumbiana records, Puerto Bolivar date is shown.

[fol. 443]

## COMPUTATION OF DAMAGES FOR EACH GRANCOLUMBIANA SAILING

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I n d e x	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Voy. No.	Ship Name	Date Sailed Guayaquil 1/	Date Arrived Phila- delphia	No. of Stems Aboard	Freight paid (Dollars)	Sailing Guay. Nearest Consolo Ship	Consolo Profit/Stem Before Stev. and Freight	Total Profit Before Stev. & Freight (5) x (8)	Total Stev. at 35¢/Stem (Est. Phila.) (5) x 35¢	Total Stev. at 48.8¢/Stem (N.Y.) (5) x 48.8¢	Net Profit at 35¢ Stev. (9)-(6)-(10)	1/3 Profit at 35¢ Stev. (12) ÷ 3	Net Profit at 48.8¢ Stev. (9)-(6)-(11)	1/3 Profit at 48.8¢ Stev. (14) ÷ 3
129	11-N	Tunja		6/13/58	6,275	\$8,080.00	6/11/58 3/	\$2.144	\$13,453.60	\$2,196.25	\$3,062.20	\$3,177.35	\$1,059.11	\$2,311.40	\$770.46
130	72-N	Medellin		6/20/58	4,898	8,080.00	6/18/58 3/	2.330	11,412.34	1,714.30	2,390.22	1,618.04	539.34	942.12	314.04
131	48-N	Ibague		6/26/58	5,956	8,080.00	6/24/58 3/	2.015	12,001.34	2,084.60	2,906.53	1,836.74	612.24	1,014.81	338.27
132	7-N	Mejia		7/3/58	6,284	9,090.00	7/1/58 3/	1.637	10,286.91	2,199.40	3,066.59	(1,002.49)	(334.16)	(1,869.68)	(623.22)
133	4-N	Cartagena de Indias		7/9/58	9,728	9,825.28	7/8/58 3/	1.749	17,014.27	3,404.80	4,747.26	3,784.19	1,261.39	2,441.73	813.91
134	2-N	Pasto		7/18/58	11,800	11,918.00	7/24/58 3/	4.688	55,318.40	4,130.00	5,758.40	39,270.40	13,090.13	37,642.00	12,547.33
135	12-N	Tunja		7/25/58	11,216	11,328.16	7/24/58 3/	4.688	52,580.61	3,925.60	5,473.41	37,326.85	12,442.28	35,779.04	11,926.34
136	3-N	Barranquilla		8/1/58	13,463	14,140.00	7/30/58 3/	4.948	66,614.92	4,712.05	6,569.94	47,762.87	15,920.95	45,904.98	15,301.66
137	49-N	Ibague		8/8/58	12,689	14,140.00	8/7/58 3/	2.862	36,315.92	4,441.15	6,192.23	17,734.77	5,911.59	15,983.69	5,327.89
138	8-N	Mejia		8/15/58	13,511	14,140.00	8/13/58 3/	1.799	24,306.29	4,728.85	6,593.37	5,437.44	1,812.48	3,572.92	1,190.97
139	5-N	Cartagena		8/21/58	13,161	14,140.00	8/21/58 3/	1.187	15,622.11	4,606.35	6,422.57	(3,124.24)	(1,041.41)	(4,940.46)	(1,646.82)
140	3-N	Pasto		8/28/58	7,312	7,385.12	8/28/58 3/	.596	4,357.95	2,559.20	3,568.26	(5,586.37)	(1,862.12)	(6,595.43)	(2,198.47)
141	13-N	Tunja		9/5/58	9,478	9,572.78	9/3/58 3/	1.706	16,169.47	3,317.30	4,625.26	3,279.39	1,093.13	1,971.43	657.14
142	4-N	Barranquilla		9/11/58	10,596	10,701.96	9/10/58 3/	2.807	29,742.97	3,708.60	5,170.85	15,332.41	5,110.80	13,870.16	4,623.38
143	50-N	Ibague		9/18/58	11,139	11,250.39	9/23/58 3/	3.193	35,566.83	3,898.65	5,435.83	20,417.79	6,805.93	18,880.61	6,293.53
144	9-N	Mejia		9/25/58	9,474	9,568.74	9/23/58 3/	3.193	30,250.48	3,315.90	4,623.31	17,365.84	5,788.61	16,058.43	5,352.81
145	6-N	Cartagena de Indias		10/2/58	11,829	14,140.00									
146	4-N	Pasto		10/10/58	12,814	14,140.00									
147	14-N	Tunja		10/16/58	13,540	14,140.00									
148	5-N	Barranquilla		10/24/58	14,003	14,140.00									

Notes: 1/ When vessel shifted to Puerto Bolivar and no Guayaquil sailing date appeared in Grancolumbiana records, Puerto Bolivar date is shown.  
 2/ Consolo arrival date @ N. Y.



EXHIBIT No. 54

[fol. 444]

BANANA FREIGHTING AGREEMENT - FREIGHTER VESSELS

Banana Freight Agreement entered into the 2nd day of May, 1958, by and between GRACE LINE INC., hereinafter called "Grace" and BANANA DISTRIBUTORS INC., hereinafter called the "Shipper".

\*                      \*                      \*

3) Freight will be computed at the rate of \$36.00 U.S. Currency per ton of 2,000 pounds based on total outturn weights. Freight is considered earned, bananas loaded or not, vessel lost or not lost. For the use of the refrigerated space specified in Paragraph One hereof, the Shipper guarantees to Grace a minimum payment against freight charges in the amount of \$0.3037 U.S. Currency per cubic foot of space made available to the Shipper, used or not used; such minimum freight payment per type of vessel totals:

SANTA INES/RITA	\$1950.
SANTA OLIVIA/ELISA	\$1800.
SANTA CATALINA	\$1800.
SANTA TERESA	\$2100.
SANTA ANA	\$2150.

Such minimum freight is to be paid by the Shipper in New York, N. Y., within forty-eight hours after the vessel has reported for loading. Certified outturn weight certificates are to be furnished by the Shipper to Grace in New York within one week after discharge of each vessel, and any additional freight charges over and above the minimum freight payment are to be remitted by the Shipper to Grace in New York within forty-eight hours after date of billing. In the event that vessel or cargo is lost after reporting for loading and certified outturn weight certificates are not available, freight will be paid on the basis of the certified outturn weight certificate of the last banana shipment of the Shipper carried by Grace preceding such loss of vessel or cargo, or on the basis of the minimum freight payment required herein, whichever is greater.

\*                      \*                      \*

Copia de carta de FLOTA MERCANTE GRANCOLOMBIANA, S.A.-Bogota

G.G. 14864

Bogota, July 8, 1957

Andes Fruit & Produce Corp.  
19 Rector Street  
NEW YORK 6, N. Y.

Gentlemen:

We acknowledge receipt of your letter dated June 8, 1957 requesting the allocation of refrigerated space on our vessels which ply between Ecuador and Philadelphia.

We wish to advise you that we recently called for bids from shippers that showed an interest in connection with this space, and after receiving the various bids we allocated the space under a forward booking arrangement to the successful bidder.

We have taken note of your application for space in our vessels, and we will be happy to advise you upon termination of the present contract, so that you may favor us with your bid in the event you decide to do so. In the interim, we would appreciate it if you would furnish us with the following information, so that we may become acquainted with your demands.

- A. Number of bananas sought to be shipped.
- B. Frequency of shipment.
- C. Name of plantations from which the bananas will originate.
- D. Names of officers, stockholders and directors of shipping and receiving corporations.
- E. Financial statements of both corporations duly certified by Public Accountants.
- F. Ports for which bananas will be destined.
- G. Generally, any other information required, which you deem necessary.

Very truly yours,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

POLICARPO GUTIERREZ E.  
Gerente General Encargado

PGE/lr.

Copia de carta de FLOTA MERCANTE GRANCOLOMBIANA, S.A.-Bogota

G.G. 14865

Bogota, D.E. July 8, 1957

WM. Turino Company, Inc.  
130 Park Place,  
NEW YORK 7, N. Y.

Gentlemen:

We acknowledge receipt of your letter dated June 6, 1957 requesting the allocation of refrigerated space on our vessels which ply between Ecuador and Philadelphia.

We wish to advise you that we recently called for bids from shippers that showed an interest in connection with this space, and after receiving the various bids we allocated the space under a forward booking arrangement to the successful bidder.

We have taken note of your application for space in our vessels, and we will be happy to advise you upon termination of the present contract so that you may favor us with your bid, in the event you decide to do so. In the interim we would appreciate it if you would furnish us with the following information, so that we may become acquainted with your demands:

- A. Number of bananas sought to be shipped.
- B. Frequency of shipment.
- C. Name of plantations from which the bananas will originate.
- D. Names of officers, stockholders and directors of shipping and receiving corporations.
- E. Financial statements of both corporations duly certified by Public Accountants.
- F. Ports for which bananas will be destined.
- G. Generally, any other information required which you deem necessary.

Very truly yours,

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

POLICARPO GUTIERREZ E.  
Gerente General Encargado

PGE/lr.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

SCHEDULE OF FREIGHTS COLLECTED ON BANANA IMPORTS INTO UNITED STATES  
NORTH ATLANTIC PORTS IN VESSELS OF FLOTA MERCANTE GRANCOLOMBIANA, S.A.  
AFTER "CDAD. DE BARRANQUILLA" VOY. 5 NORTH

<u>Vessel</u>	<u>Voyage</u>	<u>Number Of Stems Carried</u>	<u>Freight</u>	<u>Date Sailed From Ecuador</u>	<u>Date Arrived In Phila.</u>
"CD. DE IBAGUE"	51-N	12,680	\$14,140.00	10/19/58	10/30/58
"MANUEL MEJIA"	10-N	14,104	14,245.04	10/27/58	11/7/58
"CARTAGENA DE INDIAS"	7-N	13,363	14,140.00	11/3/58	11/14/58
"CD. DE PASTO"	5-N	15,094	15,150.00	11/9/58	11/20/58
"CD. DE TUNJA"	15-N	13,006	14,140.00	11/17/58	11/28/58
"CD. DE BARRANQUILLA"	6-N	14,695	14,841.95	11/23/58	12/5/58
"CD. DE IBAGUE"	52-N	12,773	14,140.00	12/1/58	12/11/58
"MANUEL MEJIA"	11-N	12,002	14,140.00	2/7/58	12/18/58
"CARTAGENA DE INDIAS"	8-N	9,386	9,479.86	12/14/58	12/25/58
"CD. DE PASTO"	6-N	9,391	9,484.91	12/21/58	1/1/59
"CD. DE TUNJA"	16-N	12,610	14,140.00	12/28/58	1/9/59
"CD. DE BARRANQUILLA"	7-N	12,151	14,140.00	1/5/59	1/16/59
"CD. DE IBAGUE"	53-N	12,088	14,140.00	1/12/59	1/22/59
"MANUEL MEJIA"	12-N	13,795	14,140.00	1/19/59	1/30/59
"CARTAGENA DE INDIAS"	9-N	13,380	14,140.00	1/25/59	2/6/59
"CD. DE PASTO"	7-N	12,357	14,140.00	2/1/59	2/13/59
"CD. DE GUAYAQUIL"	2-N	7,845	8,080.00	1/28/59	2/5/59
"CD. DE TUNJA"	17-N	13,020	14,140.00	2/8/59	2/20/59
"CD. DE BARRANQUILLA"	8-N	13,449	14,140.00	2/15/59	2/26/59
"CD. DE IBAGUE"	54-N	12,322	14,140.00	2/23/59	3/6/59
"MANUEL MEJIA"	13-N	14,029	14,169.29	3/1/59	3/11/59
"CD. DE GUAYAQUIL"	3-N	14,105	14,246.05	3/8/59	3/19/59
"CD. DE PASTO"	8-N	13,503	14,140.00	3/16/59	3/26/59*
"CARTAGENA DE INDIAS"	10-N	13,225	14,140.00	3/22/59	4/2/59
"CD. DE TUNJA"	18-N	12,485	14,140.00	3/30/59	4/8/59
"CD. DE BARRANQUILLA"	9-N	12,490	14,140.00	4/5/59	4/16/59
"CD. DE GUAYAQUIL"	4-N	12,367	14,140.00	4/12/59	4/24/59
"MANUEL MEJIA"	14-N	13,144	14,140.00	4/19/59	5/1/59
"CD. DE PASTO"	9-N	13,222	14,140.00	4/26/59	5/7/59
"CARTAGENA DE INDIAS"	11-N	13,311	14,140.00	5/4/59	5/15/59
"CD. DE TUNJA"	19-N	13,595	14,140.00	5/10/59	5/21/59
"CD. DE BARRANQUILLA"	10-N	12,602	14,140.00	5/17/59	5/29/59
"CD. DE GUAYAQUIL"	5-N	13,348	14,140.00	5/24/59	6/25/59
"MANUEL MEJIA"	15-N	9,294	9,393.00	5/31/59	6/11/59
"CD. DE PASTO"	10-N	8,047	8,127.47	6/8/59	6/18/59
"CARTAGENA DE INDIAS"	12-N	12,201	14,140.00	6/15/59	6/26/59
"CD. DE TUNJA"	20-N	11,830	14,140.00	6/21/59	7/2/59
"CD. DE BARRANQUILLA"	11-N	10,000	10,100.00	6/29/59	7/10/59*
"CD. DE GUAYAQUIL"	6-N	7,920	10,801.95	7/6/59	7/25/59
"MANUEL MEJIA"	16-N	6,700	10,801.95	7/12/59	7/24/59
"CD. DE PASTO"	11-N	7,458	10,801.95	7/20/59	7/31/59
"CARTAGENA DE INDIAS"	13-N	11,015	12,967.14	7/26/59	8/7/59
"CD. DE TUNJA"	21-N	10,740	12,619.95	8/2/59	8/14/59
"CD. DE BARRANQUILLA"	12-N	12,087	14,320.54	8/10/59	8/21/59
"DE. DE GUAYAQUIL"	7-N	11,301	13,328.21	8/17/59	8/27/59
"MANUEL MEJIA"	17-N	10,846	12,753.78	8/29/59	10/16/59
"CD. DE PASTO"	12-N	9,194	10,801.95	8/31/59	9/10/59

\* Discharged at Baltimore due to strike in Philadelphia.



[fol. 448]

BEFORE THE FEDERAL MARITIME BOARD  
EXHIBIT No. 111

## CONSOLO BANANA PURCHASE AND SALES EXPERIENCE

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
Shipment Number	Ship Name	Date Sailed Guayaquil	Date Arrived New York	Consolo Stems Shipped	Average Cost in Sucres per Stem*	Free Market Exchange Rate**	Cost in Dollars	Stems Out-turn Count	Out-turn Weight (Pounds)	Gross Sales (Dollars)	Net Sales (Dollars)	Profit be- fore Steve. and Freight	Profit per Stem Sold before Steve. and Freight
61	Santa Catalina	9/20/58	9/30/58	5908	3365	16.92	\$12,755.27	6193	454860	\$38,793.42	\$36,549.14	\$23,793.87	3.843
62	Santa Rita	9/28/58	10/8/58	6247	3134	16.92	12,634.30	6326	459940	39,169.47	37,020.84	24,386.54	3.855
63	Santa Elisa	10/3/58	10/14/58	6336	3123	16.69	12,818.15	6291	452020	38,028.64	35,190.21	22,372.06	3.556
64	Santa Ines	10/13/58	10/23/58	5624	3377	16.69	12,233.63	6184	457465	38,613.20	36,232.43	23,998.90	3.881
65	Santa Olivia	10/20/58	10/30/58	6224	3152	16.69	12,549.72	6448	455335	38,903.54	36,704.76	24,155.04	3.746
66	Santa Rita	10/20/58	11/6/58	5675	3364	16.69	12,300.36	6217	423860	36,021.31	33,175.92	20,875.56	3.358
67	Santa Ines	11/10/58	11/21/58	6084	3372	16.65	13,225.85	6467	440190	36,314.21	33,292.89	20,067.04	3.103
68	Santa Elisa	11/16/58	11/25/58	6361	3074	16.65	12,695.53	6943	455240	37,360.90	34,153.85	21,458.32	3.091
69	Santa Rita	11/24/58	12/4/58	6466	3338	16.65	13,924.23	6976	471145	30,345.49	28,080.66	14,156.43	2.029
70	Santa Catalina	11/29/58	12/8/58	6381	3153	16.65	13,032.19	6490	427900	24,460.60	22,412.84	9,380.65	1.445
71	Santa Ines	12/7/58	12/18/58	5792	3237	16.67	12,117.34	6059	402045	19,745.06	18,018.76	5,901.42	.974
72	Santa Olivia	12/12/58	12/22/58	3997	3366	16.67	8,671.36	4323	298440	15,661.30	14,476.72	5,805.36	1.343
73	Santa Rita	12/20/58	12/30/58	3841	3316	16.67	8,217.72	4156	290860	17,625.18	16,442.92	8,225.20	1.979
74	Santa Elisa	12/29/58	1/8/59	5618	3339	16.67	12,097.07	5917	418355	28,633.88	26,947.71	14,850.64	2.510
75	Santa Ines	1/4/59	1/15/59	5492	3267	16.75	11,572.55	5554	400830	27,319.62	25,607.53	14,034.98	2.527
76	Santa Catalina	1/9/59	1/19/59	5474	3190	16.75	11,282.97	6243	405620	27,799.78	25,373.44	14,090.47	2.257
77	Santa Rita	1/17/59	1/27/59	5797	3169	16.75	11,876.06	6897	467660	31,158.71	29,084.16	17,208.10	2.495
78	Santa Teresa	1/26/59	2/4/59	5050	3445	16.75	11,177.83	5415	404965	28,096.86	26,391.29	15,213.46	2.810

\* Includes Ecuador tax and plastic, rope and paint.

\*\* Free market rate applied to costs in excess of  
22.50 sucres per stem; official rate (15 sucres  
per dollar) applied to first 22.50 sucres per stem.

[fol. 449]

## Exhibit 111

## CONSOLO BANANA PURCHASE AND SALES EXPERIENCE

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
Shipment Number	Ship Name	Date Sailed Guayaquil	Date Arrived New York	Consolo Stems Shipped	Average Cost in Sucres per Stem	Free Market Exchange Rate	Cost in Dollars	Stems Out-turn Count	Out-turn Weight (Pounds)	Gross Sales (Dollars)	Net Sales (Dollars)	Profit be- fore Stems and Freight	Profit per Stem Sold before Stems and Freight
79	Santa Ines	1/31/59	2/10/59	5037	33.75	16.75	\$10,938.56	5698	417410	\$28,780.25	\$27,136.10	\$16,197.54	2.843
80	Santa Elisa	2/7/59	2/16/59	5209	36.53	16.97	12,120.06	5776	438995	30,718.49	29,049.44	16,929.38	2.931
81	Santa Rita	2/14/59	2/24/59	5073	34.81	16.97	11,289.44	5211	395730	27,688.98	25,955.71	14,666.27	2.814
82	Santa Ines	2/28/59	3/10/59	5706	35.26	16.97	12,849.43	6004	452910	29,613.88	27,544.14	14,694.71	2.447
83	Santa Teressa	3/8/59	3/19/59	5161	37.41	17.26	12,199.81	5336	422125	24,952.09	24,098.48	11,898.67	2.230
84	Santa Elisa	2/31/59	3/31/59	5285	35.91	17.26	12,033.63	5563	435260	24,020.48	23,399.81	11,366.18	2.043
85	Santa Ines	3/31/59	4/9/59	5055	37.75	17.26	12,048.82	5543	425390	24,503.26	22,352.49	10,303.67	1.859
86	Santa Rita	4/14/59	4/24/59	6160	34.27	17.24	13,445.52	6079	477420	33,951.10	31,983.44	18,537.92	3.050
87	Santa Catalina	4/18/59	4/29/59	5988	34.07	17.24	13,000.63	5907	447100	32,151.95	30,260.70	17,260.07	2.922
88	Santa Elisa	5/2/59	5/11/59	5838	33.07	17.47	12,289.21	5719	436120	30,949.60	29,211.02	16,921.81	2.959
89	Santa Rita	5/10/59	5/20/59	6289	33.12	17.47	13,256.58	6259	475960	30,349.15	29,080.43	15,823.85	2.528
90	Santa Olivia		5/25/59	6187		*	14,044.49	6016	455330	30,515.50	29,029.93	14,985.44	2.491
91	Santa Catalina		6/8/59	5663			12,855.01	5548	462440	29,179.65	27,714.87	14,859.86	2.678
92	Santa Rita		6/16/59	5351			12,146.77	5310	413130	23,591.55	22,094.88	9,948.11	1.873
93	Santa Elisa		6/23/59	6158			13,978.66	5949	446000	21,033.50	20,574.65	6,595.99	1.109
94	Santa Ines		7/1/59	5819			13,209.13	5508	396800	18,064.70	17,509.37	4,300.24	.781
95	Santa Olivia		7/6/59	5015			11,384.05	4893	363081	18,016.36	16,136.12	4,752.07	.971
96	Santa Catalina		7/20/59	4961			11,261.47	4836	366942	18,530.24	16,972.60	5,711.13	1.181
97	Santa Ines		7/30/59	3851			8,741.77	3764	281193	16,596.96	15,796.12	7,054.35	1.874
98	Santa Elisa		8/4/59	5173			11,742.71	5013	359456	22,830.16	22,151.62	10,408.91	2.076
99	Santa Rita		8/12/59	6584			14,945.68	6325	452418	25,745.32	25,416.66	10,470.98	1.655
100	Santa Olivia		8/17/59	5805			13,177.35	5614	394861	22,784.57	22,378.94	9,201.59	1.639
101	Santa Ines		8/26/59	6647			15,088.69	6456	459684	25,381.69	24,540.56	9,451.87	1.464
102	Santa Catalina		8/31/59	6589			14,957.03	6379	451267	24,632.48	24,024.38	9,067.35	1.431
103	Santa Rita		9/9/59	6949			15,774.23	6766	475198	26,911.10	26,545.75	10,771.52	1.592
104	Santa Elisa		9/15/59	5945			13,495.15	5824	404278	28,614.82	28,107.67	14,612.52	2.509
105	Santa Ines		9/23/59	6780			15,390.60	6686	471042	36,189.19	35,516.70	20,126.10	3.010
106	Santa Olivia		9/29/59	6832			15,508.64	6615	480470	36,005.69	35,302.64	19,794.00	2.992

\* Computation of costs at rate of \$2.27 per stem shipped  
(Shipments 90-106)

BEFORE THE FEDERAL MARITIME BOARD  
EXHIBIT No. 112

COMPUTATION OF DAMAGES FOR EACH GRANCOLOMBIANA SAILING [fol. 450]

456

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
	Voyage	Ship Name	Date	Date Arrived	Number	Freight	Sailing	Consolo	Total	Total	Net Profit	
Index	Number		Sailed	Philadelphia	of Stems	Paid	Guayaquil	Profit/Stem	Profit	Steve.	after Steve.	1/3 of
			Guayaquil		Aboard	(Dollars)	nearest	before Steve.	before	at \$.451	and Freight	Net
							Consolo Ship	and Freight	S. & F.	per Stem	(9-6-10)	
									(5) x (8)			
145	6-N	Cartagena de Indias		10/2/58	11829	\$14,140.00	9/30/58	3.843	\$45,458.85	\$5,334.88	\$25,983.97	\$8,660.46
146	4-N	Pasto		10/10/58	12814	14,140.00	10/10/58	3.855	49,397.97	5,779.11	29,478.86	9,825.30
147	14-N	Tunja		10/10/58	13540	14,140.00	10/14/58	3.556	48,148.24	6,106.54	27,901.70	9,299.64
148	5-N	Barranquilla		10/24/58	14003	14,140.00	10/23/58	3.881	54,345.64	6,315.35	33,890.29	11,295.63
149	51-N	Ca. de Ibagua	10/19/58	10/30/58	12680	14,140.00	10/20/58	3.746	47,499.28	5,718.68	27,640.60	9,212.61
150	10-N	Manuel Mejia	10/27/58	11/7/58	14104	14,245.04	10/26/58	3.358	47,361.23	6,360.90	26,755.29	8,917.54
151	7-N	Cartagena de Indias	11/3/58	11/14/58	13363	14,140.00	11/10/58	3.103	41,465.39	6,026.71	21,298.68	7,098.85
152	5-N	Ca. de Pasto	11/9/58	11/20/58	15094	15,150.00	11/10/58	3.103	46,836.68	6,807.39	24,879.29	8,292.27
153	15-N	Ca. de Tunja	11/17/58	11/28/58	13006	14,140.00	11/16/58	3.091	40,201.55	5,865.71	20,195.84	6,731.27
154	6-N	Ca. de Barranquilla	11/23/58	12/5/58	14695	14,841.95	11/24/58	2.029	29,816.16	6,627.45	8,346.76	2,782.23
155	52-N	Ca. de Ibagua	12/1/58	12/11/58	12773	14,140.00	11/29/58	1.445	18,456.99	5,760.62	(1,443.63)	(481.21)
156	11-N	Manuel Mejia	12/7/58	12/18/58	12002	14,140.00	12/7/58	.974	11,689.95	5,412.90	(7,862.95)	(2,620.96)
157	8-N	Cartagena de Indias	12/14/58	12/25/58	9386	9,479.86	12/12/58	1.343	12,605.40	4,233.09	(1,107.55)	(369.18)
158	6-N	Ca. de Pasto	12/21/58	1/1/59	9391	9,484.91	12/20/58	1.979	18,584.79	4,235.34	4,864.54	1,621.50
159	16-N	Ca. de Tunja	12/28/58	1/9/59	12610	14,140.00	12/29/58	2.510	31,651.10	5,687.11	11,823.99	3,940.94
160	7-N	Ca. de Barranquilla	1/5/59	1/16/59	12151	14,140.00	1/4/59	2.527	30,705.58	5,480.10	11,085.48	3,694.79
161	53-N	Ca. de Ibagua	1/12/59	1/22/59	12088	14,140.00	1/9/59	2.257	27,282.62	5,451.69	7,690.93	2,563.62
162	12-N	Manuel Mejia	1/19/59	1/30/59	13795	14,140.00	1/17/59	2.495	34,418.53	6,221.55	14,056.98	4,685.19
163	9-N	Cartagena de Indias	1/25/59	2/6/59	13380	14,140.00	1/26/59	2.810	37,597.80	6,034.38	17,423.42	5,807.23
164	7-N	Ca. de Pasto	2/1/59	2/13/59	12357	14,140.00	1/31/59	2.843	35,130.95	5,573.01	15,417.94	5,138.80
165	2-N	Ca. de Guayaquil	1/28/59	2/5/59	7845	8,080.00	1/26/59	2.810	22,044.45	3,538.10	10,426.35	3,475.10
166	17-N	Ca. de Tunja	2/8/59	2/20/59	13020	14,140.00	2/7/59	2.931	38,161.62	5,872.02	18,149.60	6,049.26
167	8-N	Ca. de Barranquilla	2/15/59	2/26/59	13449	14,140.00	2/14/59	2.814	37,845.49	6,065.50	17,639.99	5,879.41
168	54-N	Ca. de Ibagua	2/23/59	3/6/59	12322	14,140.00	2/28/59	2.447	30,151.93	5,557.22	10,454.71	3,484.55
169	13-N	Manuel Mejia	3/1/59	3/11/59	14029	14,169.29	2/28/59	2.447	34,328.96	6,327.08	13,832.59	4,610.40
170	3-N	Ca. de Guayaquil	3/8/59	3/19/59	14105	14,246.05	3/8/59	2.230	31,454.15	6,361.36	10,846.74	3,615.22
171	8-N	Ca. de Pasto	3/16/59	3/26/59	13503	14,140.00	3/21/59	2.043	27,586.63	6,089.85	7,356.78	2,452.24
172	10-N	Cartagena de Indias	3/22/59	4/2/59	13225	14,140.00	3/21/59	2.043	27,018.68	5,964.48	6,914.20	2,304.71
173	18-N	Ca. de Tunja	3/30/59	4/8/59	12485	14,140.00	3/31/59	1.859	23,209.62	5,630.74	3,438.88	1,146.28
174	9-N	Ca. de Barranquilla	4/5/59	4/16/59	12490	14,140.00	3/31/59	1.859	23,218.91	5,632.99	3,445.92	1,148.63
175	4-N	Ca. de Guayaquil	4/12/59	4/24/59	12367	14,140.00	4/14/59	3.050	37,719.35	5,577.52	18,001.83	6,000.61
176	14-N	Manuel Mejia	4/19/59	5/1/59	13144	14,140.00	4/18/59	2.922	38,406.77	5,927.94	18,338.83	6,112.33
177	9-N	Ca. de Pasto	4/26/59	5/7/59	13222	14,140.00	5/2/59	2.959	39,123.90	5,963.12	19,020.78	6,339.63
178	11-N	Cartagena de Indias	5/4/59	5/15/59	13311	14,140.00	5/2/59	2.959	39,387.25	6,003.26	19,243.99	6,414.02
179	19-N	Ca. de Tunja	5/10/59	5/21/59	13595	14,140.00	5/10/59	2.528	34,368.16	6,131.35	14,096.81	4,698.47
180	10-N	Ca. de Barranquilla	5/17/59	5/29/59	12602	14,140.00	5/25/59	2.491	31,391.58	5,683.50	11,568.08	3,856.03
181	5-N	Ca. de Guayaquil	5/24/59	6/5/59	13348	14,140.00	6/8/59	2.678	35,745.94	6,019.95	15,585.99	5,195.33
182	15-N	Manuel Mejia	5/31/59	6/11/59	9294	9,393.00	6/8/59	2.678	24,889.33	4,191.59	11,304.74	3,768.24
183	10-N	Ca. de Pasto	6/8/59	6/18/59	8047	8,127.47	6/16/59	1.873	15,072.03	3,629.20	3,315.36	1,105.12
184	12-N	Cartagena de Indias	6/15/59	6/26/59	12201	14,140.00	6/23/59	1.109	13,530.91	5,502.65	(6,111.74)	(2,037.25)
185	20-N	Ca. de Tunja	6/21/59	7/2/59	11830	14,140.00	7/1/59	.781	9,239.23	5,335.33	(10,236.10)	(3,412.03)
186	11-N	Ca. de Barranquilla	6/29/59	7/10/59	10000	10,100.00	7/6/59	.971	9,710.00	4,510.00	(4,900.00)	(1,633.33)
187	6-N	Ca. de Guayaquil	7/6/59	7/25/59	7920	10,801.95	7/20/59	1.181	9,353.52	3,571.92	(5,020.35)	(1,673.45)
188	16-N	Manuel Mejia	7/12/59	7/24/59	6700	10,801.95	7/20/59	1.181	7,912.70	3,021.70	(5,910.95)	(1,970.31)
189	11-N	Ca. de Pasto	7/20/59	7/31/59	7458	10,801.95	7/30/59	1.874	13,976.29	3,363.56	(189.22)	(63.07)
190	13-N	Cartagena de Indias	7/26/59	8/7/59	11015	12,967.14	8/4/59	2.076	22,867.14	4,967.77	4,932.23	1,644.08
191	21-N	Ca. de Tunja	8/2/59	8/14/59	10740	12,619.95	8/12/59	1.655	17,774.70	4,843.74	311.01	103.67
192	12-N	Ca. de Barranquilla	8/10/59	8/21/59	12087	14,320.54	8/17/59	1.639	19,810.59	5,451.24	38.81	12.94
193	7-N	Ca. de Guayaquil	8/17/59	8/27/59	11301	13,328.21	8/26/59	1.464	16,544.66	5,096.75	(1,880.30)	(626.77)
194	17-N	Manuel Mejia	8/29/59	/59*	10846	12,753.78	9/9/59	1.592	17,266.83	4,891.55	(378.50)	(126.16)
195	12-N	Ca. de Pasto	8/31/59	9/10/59	9194	10,801.95	9/9/59	1.592	14,636.85	4,146.49	(311.59)	(103.86)

\$674,854.99

\$1,472,204.87 \$275,901.98 \$521,645.90 \$173,866.56



[fol. 451]

FINAL SUMMARY OF DAMAGES  
FOR GRANCOLOMBIANA SAILINGS

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 113

	<u>No. of Sailings</u>	<u>No. of Stems Aboard</u>	<u>Freight Paid (Dollars)</u>	<u>Total Profit before Steve. and Freight</u>	<u>Stevedoring at 35.15 per Stem</u>	<u>Net Profit</u>	<u>1/3 of Net Profit</u>
11/5/55 - 12/31/55 (#1 through 7)	7	70,145	\$ 76,460.00	\$ 88,518.98	\$ 24,655.97	\$ (12,596.99)	\$ (4,198.99)
1/1/56 - 12/31/56 (#8 through 58)	51	468,534	551,224.00	1,192,683.54	164,689.70	476,769.84	158,923.28
1/1/57 - 12/31/57 (#59 through 107)	49	497,424	574,481.00	1,307,519.83	174,844.54	558,194.29	186,064.76
1/1/58 - 9/25/58 (#108 through 144)	37	345,302	409,637.48	755,240.93	121,373.65	224,229.80	74,743.26
10/2/58 - 9/10/59 (#145 through 195)	50	611,756	674,854.99	1,472,402.87	275,901.98 (1)	521,645.90	173,866.56
		<u>1,993,161</u>	<u>\$2,286,657.47</u>	<u>\$4,816,366.15</u>	<u>\$761,465.84</u>	<u>\$1,768,242.84</u>	<u>\$589,398.87</u>

(1) At 45.1¢ per stem from 10/2/58



BALTIMORE SERVICE

EXHIBIT No. 115

[fol. 452]

	<u>Cubic Allocated</u>	<u>90% Guarantee</u>	<u>Rate</u>	<u>Total</u>	<u>Bond</u>	<u>Security Deposit</u>
<u>Exportadora Bananera Naboá, S.A.</u>	-	Upper Tween Deck			\$63,000.00	\$24,750.00
Ciudad de Tunja	15,995	14,396	.318	4,577.93		
Ciudad de Cartagena de Indias	15,995	14,396	.318	4,577.93		
Manuel Mejia	15,995	14,396	.318	4,577.93		
Ciudad de Barranquilla	15,995	14,396	.318	4,577.93		
Ciudad de Pasto	17,380	15,642	.318	4,974.16		
Ciudad de Guayaquil	17,380	15,642	.318	4,974.16		
	98,740	88,868		28,260.04		

Banana Distributors, Inc.

45,000.00 20,000.00

1) Ciudad de Tunja	11,475	10,328	.318	3,284.30		
2) Cartagena de Indias	11,475	10,328	.318	3,284.30		
3) Manuel Mejia	11,475	10,328	.318	3,284.30		
4) Ciudad de Barranquilla	11,475	10,328	.318	3,284.30		
5) Ciudad de Pasto	11,972	10,775	.318	3,426.45		
6) Ciudad de Guayaquil	11,972	10,775	.318	3,426.45		
	69,844	62,862		19,990.10		

1 - 2 - 3 - 4Lower Tween Deck

<u>Bins #</u>	<u>Cubic</u>	
1 LTS	865	
2 LTS	760	
5 LTS	995	
6 LTS	865	
9 LTS	1,215	
10 LTS	1,190	
11 LTS	535	6,425
	6,425	

Lower Hold

1 LHS	710	
2 LHS	600	
5 LHS	905	
6 LHS	935	
9 LHS	1,000	
10 LHS	900	5,050
	5,050	11,475

5 - 6Lower Tween Deck

<u>Bins #</u>	<u>Cubic</u>	
1 LTS	1,100	
2 LTS	850	
5 LTS	1,030	
6 LTS	890	
9 LTS	942	
10 LTS	990	
11 LTS	540	6,342
	6,342	

Lower Hold

1 LHS	1,060	
2 LHS	820	
5 LHS	1,070	
6 LHS	880	
9 LHS	920	
10 LHS	880	5,630
	5,630	11,972

BALTIMORE SERVICE

[fol. 453]

	<u>Cubic Allocated</u>	<u>90% Guarantee</u>	<u>Rate</u>	<u>Total</u>	<u>Bond</u>	<u>Security Deposit</u>
<u>Charles Consolo</u>					\$16,000.00	\$30,000.00
1) Ciudad de Tunja	4,085	3,677	.318	1,169.29		
2) Ciudad Cartagena de Indias	4,085	3,677	.318	1,169.29		
3) Manuel Mejia	4,085	3,677	.318	1,169.29		
4) Ciudad de Barranquilla	4,085	3,677	.318	1,169.29		
5) Ciudad de Pasto	4,265	3,839	.318	1,220.80		
6) Ciudad de Guayaquil	4,265	3,839	.318	1,220.80		
	<u>24,870</u>	<u>22,386</u>		<u>7,118.76</u>		

Lower Tween Deck 1 - 2 - 3 - 4 - 5 - 61 - 2 - 3 - 45-6

<u>Bins #</u>	<u>Cubic</u>	<u>Cubic</u>
3 LTS	760	835
4 LTS	865	1,070
7 LTS	865	960
8 LTS	720	600
12 LTS	555	540
13 LTS	320	260
	<u>4,085</u>	<u>4,265</u>

Philip R. Consolo - Lower Tween Deck

40,000.00

40,000.00

Ciudad de Tunja	10,290	9,261	.318	2,945.00
Ciudad Cartagena de Indias	10,290	9,261	.318	2,945.00
Manuel Mejia	10,290	9,261	.318	2,945.00
Ciudad de Barranquilla	10,290	9,261	.318	2,945.00
Ciudad de Pasto	10,566	9,509	.318	3,023.87
Ciudad de Guayaquil	10,566	9,509	.318	3,023.87
	<u>62,292</u>	<u>56,062</u>		<u>17,827.74</u>

[fol. 454]

BALTIMORE SERVICE

Exhibit 115 (Page 3)

	<u>Cubic Allocated</u>	<u>90% Guarantee</u>	<u>Rate</u>	<u>Total</u>	<u>Bond</u>	<u>Security Deposit</u>
<u>Cia. Frutera Sud Americana (Ecuador) S.A.</u>					\$52,000.00	\$10,000.00
1) Ciudad de Tunja	13,305	11,975	.318	3,808.05		
2) Ciudad Cartagena de Indias	13,305	11,975	.318	3,808.05		
3) Manuel Mejia	13,305	11,975	.318	3,808.05		
4) Ciudad de Barranquilla	13,305	11,975	.318	3,808.05		
5) Ciudad de Pasto	14,216	12,794	.318	4,068.49		
6) Ciudad de Guayaquil	14,216	12,794	.318	4,068.49		
	81,652	73,488		23,369.18		

Lower Hold - 1 - 2 - 3 - 4 - 5 - 6

<u>1 - 2 - 3 - 4</u>		<u>5 - 6</u>
<u>Bins #</u>	<u>Cubic</u>	<u>Cubic</u>
3 LHS	600	815
4 LHS	715	960
7 LHS	935	870
8 LHS	800	490
11 LHS	430	435
12 LHS	470	435
13 LHS	250	245
14 LHP	1,000	975
15A LHP	470	460
15 LHP	430	451
16 LHP	430	435
17 LHP	470	435
18 LHP	250	245
19 LHP	755	1,070
20 LHP	935	880
21 LHP	935	870
22 LHP	800	490
23 LHP	715	1,060
24 LHP	600	820
25 LHP	600	815
26 LHP	715	960
	13,305	14,216

[fol. 455]

1.	Total cubic of 6 vessels sailing to Baltimore	337,398 feet
2.	Total cubic of 4 vessels sailing to Galveston	194,164 feet
3.	Total cubic allowed to Philip R. Consolo on 6 vessels sailing to Baltimore	62,292 feet
4.	Total available sailings for 2 years on 6 vessels sailing to Baltimore (Arrived at by dividing 6 into 104 weeks)	17.33
	Times 337,398 equals	5,847,107.34
5.	Total available sailings for 2 years on 4 vessels sailing to Galveston (Arrived at by dividing 4 into 730 days)	18.25
	Times 194,164 equals	3,543,493
6.	Total cubic available at both Baltimore and Galveston	9,390,600.34 feet
7.	Total cubic allowed to Philip R. Consolo for 2 years 17.33 times 62,292 equals	1,079,520.36 cubic feet
8.	Percentage of cubic capacity allotted to Philip R. Consolo on Baltimore vessels	18.46
9.	Percentage of cubic capacity allotted to Philip R. Consolo on Baltimore and Galveston vessels	11.50

[fol. 456] [File endorsement omitted]

[fol. 457]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
No. 18,230

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FLOTA MERCANTE GRANCOLOMBIANA, S. A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

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No. 18,235

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PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S. A., Intervenor.

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Petition for Review of an Order of the  
Federal Maritime Commission

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Second Supplemental Joint Appendix—Filed April 16, 1964

[fol. 463]

## BEFORE THE FEDERAL MARITIME BOARD

Docket No. 827

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PHILIP R. CONSOLO, Complainant,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., PANAMA  
ECUADOR SHIPPING CORPORATION, Respondents.

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COMPLAINANT'S REPLY TO PETITION OF RESPONDENT GRAN-  
COLOMBIANA FOR EXTENSION OF TIME TO ANSWER COM-  
PLAINT—Filed December 4, 1957

\* \* \* \* \*

The complaint was filed under section 22 of the Shipping Act which provides that any person may file a sworn complaint setting forth any violation of the Act by a common carrier. The carrier against whom the complaint is filed must satisfy the complaint or answer it in writing "within a reasonable time specified by the Board." The Board's rules provide for answer within 20 days.

Complainant has an absolute statutory right to file a complaint and to have it determined within a reasonable time. A respondent is not authorized to forestall consideration of a complaint by anticipating its filing and requesting an advisory opinion in the same dispute on a non-adversary basis.

The petition for declaratory order was filed by Grancolombiana on November 8th, 1957, approximately two weeks after Consolo (complainant in this proceeding) had made the latest in a series of demands upon Grancolombiana for space. That demand was dated October 21, 1957. It stated that if the demand for space were not met by No-

vember 15, 1957, Consolo would file a complaint against Grancolombiana, claiming a space allotment and damages. [fol. 464] The Grancolombiana petition for declaratory relief was filed a week before the deadline specified in the Consolo demand of October 21.

\* \* \* \* \*

Grancolombiana implies, in its petition for declaratory relief and its petition for indefinite postponement of its time to answer the complaint, that it finds itself helplessly torn between the inconsistent demands of competing interests. Whatever may be the embarrassment of Grancolombiana's present status, that embarrassment is Grancolombiana's own creation. Consolo's demands for space on Grancolombiana's ships were submitted long before Grancolombiana executed its space contracts now in force.

\* \* \* \* \*

We submit that Grancolombiana is not entitled to flout the law and thereafter demand that the Board rescue it from the consequences of its unlawful conduct.

We do not know whether Grancolombiana will be liable to its present shipper for breach of contract if it awards space to Consolo. The fact that it may be, however, is no reason to deny Consolo an opportunity to obtain prompt disposition of his own claim which rests on the allegation that Grancolombiana has unlawfully excluded him from its vessels.

The complaint in this case was served November 15th. Grancolombiana did not verify its petition for an extension of time until two weeks later (November 29th) and did not serve it until December 2nd. We believe that this constitutes unwarranted delay, and that no reason has been shown which justifies an extension of time to answer beyond December 5th.

Respectfully submitted,

George F. Galland, Attorney for Complainant.

December 4, 1957



[fol. 465]

BEFORE THE FEDERAL MARITIME BOARD

(Rec'd FMB April 14, 1958)

GALLAND, KHARASCH & CALKINS

Attorneys at Law  
1413 K Street, N. W.  
Washington 5, D. C.

April 10, 1958

Mr. G. O. Basham  
Chief Examiner  
Federal Maritime Board  
Washington 25, D. C.

Re: Consolo v. Grancolombiana—  
Docket No. 827

Dear Mr. Basham:

This refers to the letter from Mr. Elkan Turk, Jr. to you dated April 8th, in which Mr. Turk implies that improper *ex parte* representations have been made by me to you with respect to the conduct of this case.

My first communication to you in the series mentioned by Mr. Turk was my letter of March 31, 1958, requesting a prehearing conference at an early date. A copy of that letter was furnished to Mr. Turk and to Mr. Giallorenzi. You replied in a letter dated April 2nd, informing me for the first time that Docket No. 827 was being "held in abeyance" until the Board should act on Grancolombiana's petition for a declaratory order. Since the determination to hold the case in abeyance was *ex parte* as far as I was concerned, it constituted a surprise to me, and I made inquiry by a telephone call to you—in which I then discerned and now discern no impropriety. I summarized our telephone conversation in a letter to you dated April 3rd, of which copies were furnished to Mr. Turk and Mr. Giallorenzi.



In my letter to you of April 3rd, I stated that I would stop in your office in the near future to discuss a specific date for a prehearing conference. I have not yet made the promised visit or otherwise discussed a prehearing date with you. Mr. Giallorenzi by letters of April 2 and April 4 urged delay in setting a prehearing conference. Mr. Turk also urged delay in his letter of April 8th. My own preference for a specific date has not yet been expressed. Obviously, I have given Messrs. Turk and Giallorenzi full opportunity to express their preference before expressing my own.

In summary, I emphasize that I have furnished to Messrs. Turk and Giallorenzi a copy of each of my written communications to you, plus a written report of our single telephone conversation. I consider myself not guilty in even a remote degree of furtive presentation of my side of the case.

Mr. Turk's concluding paragraph imputes to me a disregard of the convenience to other parties in setting a prehearing date. Since I have given the other parties full opportunity to express their preference before expressing my own, I plead not guilty to this count.

While I would have chosen a date earlier than the week of May 7th, I am satisfied to respect the convenience of Messrs. Turk and Giallorenzi by acquiescing to the dates suggested by them. For whatever materiality it may have in relation to the prehearing conference, I anticipate that the hearing itself will require about two hours for the presentation of the complainant's direct case relative to all matters other than the measure of reparation.

Very truly yours,

George F. Galland

cc. Elkan Turk, Jr., Esq., Renato C. Giallorenzi, Esq.

[fol. 467]

## BEFORE THE FEDERAL MARITIME BOARD

FMB Docket No. 827

## PETITION TO INTERVENE—Filed April 29, 1958

Pursuant to Rule 3(b) and Rule 5(n), Public Counsel petition for leave to intervene in this proceeding.

The complaint alleges that respondent Flota Mercante Grancolombiana, S.A. (hereinafter referred to as Grancolombiana) is a common carrier by water of cargoes in the trade from Ecuador to points on the Atlantic Coast of the United States. It is further alleged that Grancolombiana has contracted all of its refrigerated space, suitable for the carriage of bananas, to respondent Panama Ecuador Shipping Corporation and that Grancolombiana has failed to comply with complainant's demands for refrigerated space.

The complainant contends that Grancolombiana, by refusing to allocate refrigerated space to complainant, has violated Sections 14, 15, and 16 of the Shipping Act, 1916, and that Grancolombiana, a member of the Association of West Coast Steamship Companies, has violated Conference Agreement No. 3302.

Respondent Grancolombiana denies that it has violated any of the provisions of the Shipping Act, 1916, or that they have violated their conference agreement. They admit that they operate as a common carrier by water, but they contend that they are a contract carrier of bananas.

The question of whether or not Grancolombiana is a common carrier of bananas from Ecuador to United States Atlantic ports is one of substantial public interest in that it raises a serious question of the Board's jurisdiction.<sup>1</sup>

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<sup>1</sup> Similar issues were raised in *Banana Distributors Inc. v. Grace Line Inc.*, and *Arthur Schwartz v. Grace Line Inc.*, Docket Nos. 771 and 775, 4 F. M. B. — (decided April 30, 1957), where Public Counsel's petition to intervene was granted by Examiner C. W. Robinson.

The public interest in this proceeding is substantial and the grounds for intervention are pertinent to the issues already presented and do not unduly broaden them. [fol. 468] Public Counsel therefore request leave to intervene and be treated as a party to this proceeding.

Respectfully submitted,

Robert E. Mitchell, Assistant General Counsel,  
Edward Aptaker, Chief, Regulation Branch, Division of Litigation, Robert J. Blackwell, Public Counsel.

Washington 25, D. C.  
April 29, 1958

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BEFORE THE FEDERAL MARITIME BOARD

Served June 23, 1958

FMB Docket Nos. 827 and 835

RULING ON MOTION FOR PRODUCTION OF DOCUMENTS  
FOR INSPECTION AND COPYING

At the prehearing conference herein counsel for complainant in No. 827 filed a motion for an order requiring the production by respondent of documents for inspection and copying. Respondent has agreed to produce only that material referred to in items 1, 2, 3, 4, and 9(a), (b), and (c)(2) of the motion.

As the material sought in contested items 5, 6, 7, 8, 9(c)(1), and 10 of the motion is relevant to the basic issues involved or pertains to the question of reparation, and as it is hereby determined that the question of reparation shall be heard at the same time as the basic issues in the consolidated proceedings, respondent is hereby directed to produce for complainant's inspection and copying the material referred to in the contested items.

The material which respondent has agreed to produce, and that which is herein directed to be produced, shall be made available for inspection and copying at the office of respondent's agent in New York, N. Y., at the mutual con-

venience of the parties and within a reasonable time herefrom, the cost of the copying to be at complainant's expense. If, in the opinion of complainant's counsel, the material to be copied cannot be reproduced feasibly at the office of respondent's agent, it may be taken to a place reasonably close thereto for copying.

C. W. Robinson, Presiding Examiner

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BEFORE THE FEDERAL MARITIME BOARD

Served August 21, 1958

FMB Docket Nos. 827 and 841

**RULING ON REQUESTS FOR BILLS OF PARTICULARS AND  
FOR DISCOVERY AND INSPECTION OF DOCUMENTS**

In No. 827 respondent has requested a bill of particulars and moved for the production, inspection, and copying of documents. Reply thereto has been filed by complainant. A reply in the form of an affidavit of counsel has been filed to complainant's reply. Complainant's counsel, by letter, opposes consideration of the reply affidavit. The same series of documents has been filed in No. 841, except that complainant's counsel has filed a motion to exclude respondent's reply affidavit.

Rule 5(p) of the Board's Rules of Practice and Procedure provides that a reply is not permitted. No reason appears why this rule should be waived in the present instance, hence the reply affidavits will not be received.

Answer in No. 827 was filed on December 19, 1957. There is no indication that the complaint was so vague or in such form that a proper answer thereto could not be filed. As the underlying purpose of a bill of particulars is to supply additional information to permit a party to plead, the request for a bill of particulars in No. 827 is denied.

Answer had not been filed in No. 841. As the complaint in that proceeding states a prima facie cause of action, and as it does not appear to be so vague as to require fur-

ther particulars to enable respondent to make answer, the request for a bill of particulars in No. 841 is denied.

The motion for discovery in each proceeding identifies the desired material as "any and all correspondence, contract, invoices of whatsoever nature and any and all other documents exchanged between the complaint and the growers in Ecuador, their customers in the United States and [fol. 470] steamship companies which carried bananas from Ecuador to the United States for the complainant's account from [November 4, 1955, in No. 827 and July 21, 1956, in No. 841] to the date of this application." In No. 827 the supporting affidavit prays that the motion be granted "for the reasons stated above." This has reference to the request for bill of particulars, namely, that respondent must inquire of complainant as to its method of computation of damages. Complainant's reply asserts that the motion is defective as it makes no attempt to show good cause or that the information sought is relevant, and does not designate the documents with the proper specificity.

Rule 12(k) of the Board's Rules of Practice and Procedure provides that "upon the motion of any party showing good cause therefor," discovery, inspection, and copying may be ordered of specified documents, etc., "which constitute or contain evidence relating to any matter, not privileged, which [are] relevant to the subject matter involved \* \* \* ." The reasons advanced for the discovery of the documents in the present proceedings are sufficient, and the documents are relevant to the subject matter involved. Furthermore, complainant would have to produce the documents in any case as part of its proof on reparation; producing it now rather than at the hearing might well result in the shortening of the hearing.

A somewhat different situation exists in No. 841. As previously stated, respondent's counsel failed to supply a concurrent affidavit in support of the discovery in that proceeding, and the later filed affidavit in being rejected as constituting a reply to a reply. This leaves no written justification on file. Since both proceedings seek the same general relief, however, and since the documents sought

in both are the same, it would be hyper-technical to grant the motion in one case and to deny it in the other, all other things being equal, it would be unthinkable to treat the two [fol. 471] complainants differently.

The motions for discovery are granted. The material directed to be produced shall be made available for inspection and copying at complainants' offices in New York, N. Y., at the mutual convenience of the parties and within a reasonable time herefrom, the cost of the copying to be at respondent's expense. If, in the opinion of respondent's counsel, the material to be copied cannot be reproduced feasibly at complainants' offices, it may be taken to a place or places reasonably close thereto for copying.

C. W. Robinson, Presiding Examiner.

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BEFORE THE FEDERAL MARITIME BOARD

Served September 11, 1958 FMB Docket Nos. 827 and 841

RULING ON MOTIONS TO TAKE DEPOSITIONS AND NOTICE  
OF FURTHER PREHEARING CONFERENCE

1. Respondent moves to take the deposition of complainant in No. 827, and of Sol Palitz, a vice president of complainant in No. 841. Complainants oppose the motions. There is no showing that the witnesses will not be present at the hearing, that their testimony should be perpetuated, or that the loss of the testimony sought is threatened. The motions therefore are denied.

2. In view of complainants' apparent willingness to cooperate with respondent in its effort to secure certain information relating to reparation, and pursuant to Rule 6(d) of the Board's Rules of Practice and Procedure, a further prehearing conference will be held herein before the undersigned on September 22, 1958, beginning at 10 o'clock a.m., in Room 4519, New General Accounting Office Building, Washington, D. C. The conference will be limited to matters pertaining to the issue of reparation.

C. W. Robinson, Presiding Examiner.

[fol. 472]

## BEFORE THE FEDERAL MARITIME BOARD

FMB Docket 835

BRIEF FOR PETITIONER FLOTA MERCANTE GRANCOLOMBIANA,  
S.A. AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS—  
Filed January 13, 1959

\*     \*     \*     \*     \*

It is significant to note that the credible testimony of Mr. Friedlander was not impeached nor was it shaken in any manner whatsoever to the effect that the physical characteristics of petitioner's vessels make it impossible to service more than one shipper abroad for the purpose of carrying bananas. Mr. Friedlander, whose testimony was backed by the experience of seeing hundreds of loadings and unloadings of petitioner's vessels and a considerable amount of loadings and unloadings of Grace Line vessels, testified in great detail that even to permit three shippers, each sharing one deck alone aboard the petitioner's vessels, would cause chaos and confusion and so extend the loading or unloading time as to cause great delays in the shipments of bananas, which delays, according to Mr. Borrero, might be so disruptive upon the schedules of the vessels, particularly the southbound service which is much more remunerative to the petitioner, that it might cause the petitioner to abandon the carriage of bananas because of the harmful effect of the delays upon the southbound voyages.

A careful examination of Mr. Friedlander's testimony shows beyond a doubt that the acute problem of loading bananas aboard the petitioner's vessels commences with the very moment a longshoreman starts to walk up the staging from the barge into the side ports of its vessels which are located in the upper 'tween deck and which are so narrow as to permit only one longshoreman entering and leaving the vessel at the same time. The problem of loading the petitioner's vessels increases as the longshoremen commence to walk down the stagings into the lower hold,

which stagings Mr. Friedlander testified had to be placed at an acute angle because of the physical makeup of these vessels and the height of the decks, particularly the lower hold.

[fol. 473] Certainly these problems are not found in the Grace Line refrigerated holds which, we repeat, were constructed under the guidance of competent banana carriers for the purpose of carrying this commodity.

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BEFORE THE FEDERAL MARITIME BOARD

FMB Docket Nos. 827, 835, 841

BRIEF OF PANAMA ECUADOR SHIPPING CORPORATION—  
Filed January 13, 1959

\* \* \* \* \*

6. The Effect of Permitting the Use of the Flota Refrigerated Space by More Than One Banana Shipper.

The paramount consideration in determining the effect upon the eventual out-turn of bananas at Philadelphia of the introduction of more than one shipper into the Flota reefer space is that in loading the vessel in Ecuador, only one shipper may use a side port at any one time. There are a number of reasons why no shipper would be willing to share the same entry port at one time with another shipper. As Friedlander put it (R. 1420): "How are you going to separate who's carrying which stem of fruit? These people are animals down there. We have our own problem separating our own fruit."

Earlier in writing to Panama's buying agent in Ecuador, Friedlander had written (Ex. 98) " \* \* \* you and I both know the nature of the stevedores in Bolivar; you can't get them to go into the particular place you want them to go many times."

There was an illuminating colloquy between the examiner and Mr. Friedlander which commenced with the examiner's inquiry as to why more than one shipper could not use one side port at the same time. The transcript reflects the following (R. 1457-1459):



"The Witness: I'll tell you some of the problems, Mr. Robinson.

In the first place, we have fruit sorters now in the banana holds because of the height of these decks where we have to go to this very unconventional three- [fol. 474] high stowage. We try to break the fruit down into the different sizes in various bins, calling them Chicos, Mediandos, and Grandes. The damage that would be created would be maximized on three-high stowage if you put a great big 12- or 13-hand stem on top of an 8- or 9-hand stem. So we try to separate the fruit into different sizes as she's going into these various bins. We have a man down at the foot of each staging calling 'Grande', 'Mediando', 'Chico'.

Examiner Robinson: That's the stagings within the hold, not on the—

The Witness: The stagings within the hold.

Examiner Robinson: All right. I just want to follow you.

The Witness: And many times they will go into areas where they are not supposed to go.

On top of that, I described to you the method of making these keys when they're locking each particular bin. There will be a couple of stackers. Let's say in this area there are men coming down the stages and running around to stow the fruit. And we'll call 'Mediando', which is let's say for this bin—

Examiner Robinson: That's all done within the ship?

The Witness: That's all done within the ship. The man that is stowing the— The paid of men stowing in this bin, they're looking for a certain-size few stems to close that bin up. They don't want anything too big or anything too small. They will collar this guy. They'll actually pull him out of the run to take a particular size stem of bananas that they want to finish off that bin with.

If there were two or three coming in to the same area, there would be total, complete confusion.

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[fol. 475]

## BEFORE THE FEDERAL MARITIME BOARD

FMB Docket Nos. 827, 835, 841

BRIEF OF COMPLAINANT PHILIP R. CONSOLO—

Filed January 14, 1959

• • • • •

Complainant requests an order (a) adjudging the contract between Flota and the preferred shipper to be contrary to law, and void and directing Flota to cease and desist from carrying out such contract; (b) requiring Flota to allot immediately to complainant refrigerated space for the shipment of bananas in Flota's vessels in the trade from Ecuador to United States Atlantic ports, averaging 50,000 cubic feet per week, or such portion thereof as the Board may find to constitute complainant's fair share; and (c) ordering Flota to pay reparation to complainant in the sum of \$600,000, plus such further damages as may accrue to the date of the Board's final disposition of this proceeding.

The complaint of Banana Distributors in Docket 841 is similar to Consolo's complaint, and seeks both a determination of Flota's status and reparation.

At the hearing the Examiner granted a motion to sever the issue of Flota's common carrier status from the issue of reparations (888-9). Proceedings to measure damages have thus been deferred.

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Since July 1957 five new ships (TUNJA, MEJIA, INDIAS, PASTO, BARRANQUILA) have entered the service, which, with the IBAGUE, comprise the six now on the run (Ex. 1). Another new vessel (GUAYAQUIL) will replace the IBAGUE in early 1959 (1283).

Since the sixth vessel was placed on the run, the service has been extended to Peru (339). The new ships are about three knots faster than the old ships (1776) and each has 55,000 cubic feet of space suitable for the carriage of

bananas (Ex. 2). With the assignment of new ships to the run, the service improved (1775-6).

\* \* \* \* \*

### 1. *The Facts*

Desperate for an issue with which to defend the complaints, Flota in its answer contends that its vessels are not [fol. 476] suitable for the carriage of bananas of more than one shipper. But Flota apparently thought better of this "issue" at the hearing and was content to let intervener carry its burden of going forward with proof. Contrasted with the testimony of Mr. Friedlander, intervener's general manager, Mr. Borrero's candor was like a breath of fresh air. His best effort on direct examination was the claim that any "appreciable" increase in banana loading time would cause problems in fulfillment of schedules (1260)—a claim which falls miles short of meeting the "issue". His objection against having more than one shipper aboard was that it might be inconvenient—not that it would be impossible. He stated "... it is better to deal with one than with three in any facet of negotiations. It is less problems" (1806). He admitted, however, that the problems in dealing with three would be more than offset by the prospect of more revenue (1807). And he is willing to give it a try if the Board should so ordain (1803-6, 1858).

The best evidence that Flota's ships *are* suitable for carriage of bananas of more than one shipper is the willingness of complainants to ship on the basis of less than full occupancy of the entire refrigerated space and their testimony that Flota's vessels are suitable for the carriage of bananas of more than one shipper (306-8, 919-20). Complainants are experienced banana importers willing to risk millions on the venture (Ex. 25, pp. 2 and 6)—if only given the chance. That the ships are suitable for multiple shippers also can be determined from the physical characteristics of the refrigerated space. The refrigerated cargo hold (No. 3) on all of Flota's ships is divided into three levels. Of the six ships now in service, five (TUNJA, MEJIA, INDIAS, BARRANQUILLA, and PASTO) are

spanking new. With the exception of the PASTO, the No. 3 hold in all of the new ships has the same cubic (55,000 feet) and deck heights, as follows (Exs. 2, 9, p. 4):

	<i>Cubic</i>	<i>Height</i>
Upper 'tween deck	15,990	9' 1"
Lower " "	20,650	9' 8"
Lower hold	18,360	8' 10"

The division of cubic on the PASTO differs only slightly from the other four. The sixth ship in service (IBAGUE) [fol. 477] will soon be replaced with a new ship similar to the others. The three level arrangement of the space suggests that the space is tailor-made for three shippers (Exs. 10, 11) and indeed, it is (306-7).

## 2. *The Distortions*

The distortions were furnished by intervener—the only party to profit from delay and the myth that Flota's vessels are unfit for several shippers at one time. Mr. Friedlander, the chief witness for intervener, was followed by (1) Mr. Baratta, a fruit selector employed by intervener and (2) Mr. Visconti, a refrigeration engineer retained by intervener, both of whom succeeded in contradicting most of what Mr. Friedlander had to say. Mr. Friedlander's contribution to the record was an ad nauseam rendition of the current advertising slogan (banana version). "Couldn't be done, couldn't be done, couldn't be done". Loading, carrying and unloading the bananas of more than one shipper (said Mr. Friedlander) couldn't be done. But when it came to explaining why it couldn't be done, Mr. Friedlander was in trouble. His testimony falls into one of three categories:

- (1) *Patent irrelevancies*—Most of his testimony related to problems, real or fancied, which are now present and which will remain irrespective of the number of shippers aboard (1083-5, 1104-5, 1127-9, 1131-4, 1163, 1171, 1190). The problems presented by staging equipment, for example, were commented upon at length, but on cross—were admitted to be present

in any event and to cause no additional delay (1394, 1408-9).

- (2) *Palpable exaggerations*—or an effort to make seem mysterious and complicated that which is prosaic and simple. His description of the mechanics of [fol. 478] loading the ships with a view to the unloading gear is an example<sup>15</sup> (1129-36).

\* \* \* \* \*

\* \* \* Further, intervener's attempt to show Flota's inferiority boomeranged in the face of evidence as to Flota's (a) newer ships, (b) lower rates and (c) equivalent transit time (Exs. 1, 10-20, 35, 106). Contrary to Mr. Friedlander's assertions concerning the defects in Flota's service, are the admissions of his fruit selector, Mr. Baratta, (1) that better quality fruit arrives on Flota ships (1642) and (2) more damaged fruit arrives on Grace (1643), and his refrigeration expert, Mr. Visconti, that Flota's refrigeration facilities are satisfactory (1735-6, 1738)—an admission which was fortified by Mr. Borrero's testimony that the refrigeration facilities are "good" (1815). Mr. Friedlander's distortions that on Flota ships (1) we have outturned 50 to 60% ripe "fruit" (1164) and (2) "I should have added 3 to 5% extra ripens on the Grancolombiana vessels for stems that were thrown away" were impeached by his own records which show (1) the percentage of "ripes" has never

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<sup>15</sup> Mr. Friedlander's description of loading the Flota ships brings to mind an old Jimmy Durante routine. Durante would say he was waiting in line to get on a bus behind a woman with a large shopping bag: "She opens the shopping bag, takes out her purse and closes the shopping bag. Then she opens her purse, takes out her change purse, closes her purse, opens the shopping bag, puts her purse in the shopping bag and closes the shopping bag. I stands on the other foot. She opens her change purse, takes out a dime [this was an old routine], closes her change purse, opens the shopping bag, takes out her purse, closes the shopping bag, opens her purse, puts in the change purse, closes her purse, opens the shopping bag . . ." and so on.

So here, the ship could have been loaded with a cargo of a million pounds of bananas in the time it took Mr. Friedlander to describe the operation.

exceeded 13.41% (IBAGUE, Ex. 96, Voyage 151, discharged Aug. 9, 1958)—which is more than double the figure for any other Flota shipment and (2) stems discharged upon arrival averaged just 1% (Ex. 99)—not an unusual amount by comparison with the figures for Grace shipments (Ex. 100).

Mr. Friedlander's estimates of the delays to be encountered with multiple shippers (3 shippers, 7 to 12 hours; [fol. 479] 6 shippers, 10 to 15 hours; 10 shippers, 30 to 40 hours (1445)), were impeached by his admissions that (1) the time it takes to load the lower hold would be the same with one or three shippers (1435); (2) the changing of pontoons and stages would not occasion delay (1394); (3) delays can be minimized by the employment of competent supervisory personnel (1417-8, 1456); and (4) delays can be eliminated if the shippers used a common loader (1526).

It is ridiculous to assume (as Mr. Friedlander did) that shippers in the same boat would not co-operate with each other to expedite loading as a matter of enlightened self-interest. Even Mr. Friedlander admitted that it would be foolish for shippers to place obstacles in each other's path (1391-3). If a single stevedoring crew were used and a single loading boss employed with authority to deploy teams of stackers where needed, the bananas of more than one shipper can be loaded in the same vessel and in substantially the same time now consumed (1417-8, 1456). Mr. Friedlander's abhorrence at the "confusion" which he said would result if bananas of more than one shipper were loaded simultaneously—was not shared by complainants (306-8, 919-20). By the simple device of painting the stems of each shipper's bananas a different color (paint is now used in any event to seal in the juices), each stem will find its proper resting place in the part of the ship assigned to its owner. Even Mr. Friedlander will admit that the long-shoremen that load the ships are not color blind.

\*     \*     \*     \*     \*

## COMPLAINANT'S PROPOSED FINDINGS AND CONCLUSIONS

\* \* \* \* \*

3. Since July 1957, five new ships (TUNJA, MEJIA, INDIAS, PASTO, BARRANQUILLA) have entered the service, each having 55,000 cubic feet of space suitable for the carriage of bananas. The sixth ship now in service (IBAGUE) will soon be replaced by a new ship. Between July 1955 and the fall of 1957, the service was operated with five ships. With the addition of a sixth ship to the service in 1957, the service has been extended to Peru and has improved (11-12).

\* \* \* \* \*

[fol. 480] 16. Flota's vessels are suitable for the carriage of bananas of more than one shipper. The refrigerated cargo space on all the ships is divided into three levels. Because of this arrangement, space is ideally suited for use by three shippers. Five of the new ships now in service are brand new. A sixth new ship soon will be added. Complainant considers the space desirable, is willing to share the space, and is willing to risk millions in shipping bananas on the basis of less than full occupancy of the space (25-7).

17. Flota presented no evidence in support of its defense that its vessels are not suitable for the carriage of bananas of more than one shipper. Flota's only objection to several shippers is that it might be inconvenient—not that it would be impossible (25-6).

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## BEFORE THE FEDERAL MARITIME BOARD

FMB Docket Nos. 827, 835, 841

BRIEF OF PUBLIC COUNSEL—Filed January 14, 1959

\* \* \* \* \*

As noted, Flota does not challenge the Board's decision in *Banana Distributors*, Docket Nos. 771/775. That decision prohibits a common carrier of general commodities from asserting contract carrier status as to bananas on its berth vessels. However, in that decision, the Board held

that the carrier's duties to banana shippers would depend upon the factual circumstances attending the loading, transportation, and discharge of the bananas. Thus, we believe that the loading and unloading problems that would be encountered by the introduction of other banana shippers to Flota's vessels pose the real question confronting the Board and the Examiner. This brief deals only with that factual problem.

### *Summary of the Evidence*

Flota operates six vessels in its common carrier service between United States North Atlantic ports and ports on the West Coast of South America (Ex. 1, Tr. 23). This service has, since 1955, been operated on an approximately weekly frequency (Tr. 25-26). Prior to December 16, 1955, that frequency could be maintained with 5 vessels. How-[fol. 481] ever, on that date the service was extended to Peru, and in order to maintain a weekly service, Flota added a sixth vessel to its fleet.

Five of the ships now employed in this trade were built since 1957, and have a service speed of about 17½ knots. The other ship was built in 1951, and has a speed of 15½ knots (Ex. 1, Tr. 61-62). The latter vessel will be replaced by a new and faster ship in January or February, 1959, giving Flota a fleet of six new ships of equal class and speed (Tr. 1752-1753).

\* \* \* \* \*

Because of the high deck heights in the lower hold of the old Flota ships, bananas had been stowed three high to utilize the full cubic capacity of the compartment (Tr. 185). This put too much weight on the bottom stems (Tr. 476). In order to minimize damage, an employee of the shipper would inspect the bananas as they came aboard the vessel, and the heavier stems were stowed in the upper tween deck (Tr. 1415). Thus, to some extent the lower deck and upper tween deck were loaded simultaneously.<sup>3</sup>

<sup>3</sup> These circumstances still obtain in connection with the loading of the single surviving old ship.



The five new Flota ships, and presumably the sixth which will soon enter service, have less deck height in their lower holds than their predecessors (Ex. 9, Tr. 66). In fact, four of the new vessels now in service have less height in the lower hold than in the two holds above (Ex. 9).

As the lower hold becomes filled, some of the stages upon which the stevedores walk are removed and bananas are placed in the area where the stages had been. During the removal of these stages, all banana loading is stoppd (Tr. 1152). When the last stage is removed, the stevedores pass the bananas by hand to the men still working in whatever unoccupied space is left in the lower hold (Tr. 1135). As the loading of the lower deck nears completion, the rate of loading into that deck declines, but this slack is taken up by an increase in the loading of the upper tween deck [fol. 482] (Tr. 1155). However, a considerable portion of the lower tween deck cannot be loaded until the lower hold is finished because the various paraphernalia needed to close the square of the hatch between the two holds are stored on the floor of the lower tween deck (Tr. 1413). Upon completion of loading in the lower deck, the refrigerated plugs and hatch covers are set in place in the square of the hatch and the lower hold is closed (Tr. 1416-1417). That loading procedure is repeated in the loading of the two upper decks (Tr. 1525).

\* \* \* \* \*

Flota calls almost every northbound vessel at Buenaventura, Colombia (Tr. 1241). Coffee is the principal cargo at that port, and from the standpoint of both revenue and tonnage, coffee is more important to Flota than the bananas which are loaded in Ecuador (Tr. 1243-1245). Because of the increased speed of the new Flota vessels, they presumably will be able to spend up to 60 hours loading coffee at Buenaventura without increasing their 12-day transit time from Ecuador to Philadelphia.

Flota's banana cargoes are unloaded at Philadelphia via a revolving pocket elevator and a system of conveyors (Tr. 77, 1127-1131, 1180). Friedlander stated that if more than one shipper were aboard these vessels, the unloading time

would be approximately doubled (Tr. 1186). In summary of his testimony, the witness stated that carriage of bananas on the Flota vessels is economically feasible only when all the refrigerated space is allotted to a single shipper (Tr. 1190).

Flota also carries bananas from Ecuador to U.S. Gulf ports on a 10 to 12-day frequency (Tr. 1621). This space is contracted to a single shipper who unloads the bananas at Galveston, Texas (Tr. 1260, 1265, 1618). The four vessels in the Gulf service are older and slower than the vessels in Flota's Atlantic service (Tr. 1620). Nevertheless, because of the shorter distances involved, the transit time between Ecuador and Galveston is one or two days shorter than that between Ecuador and Philadelphia (Tr. 1621).

\*     \*     \*     \*     \*

[fol. 483] Under the circumstances, it is our view that more than one shipper can be accommodated on the Flota vessels, and that in denying space to the complainants, Flota has unjustly discriminated against complainants in violation of Sections 14 and 16 of the Shipping Act, 1916. Flota should be required to cancel its contract with Panama-Ecuador Shipping Corporation and make its refrigerated space available to all qualified shippers under reasonable conditions.

Flota's petition for declaratory order asks for a clarification, not only of its status in the Atlantic trade, but also in the Gulf trade. Nothing in the record serves significantly to distinguish Flota's U. S. Gulf from its U. S. Atlantic service. Thus, in that trade, too, Flota should be ordered to cancel its present contract and make its refrigerated space available to all qualified shippers.

Respectfully submitted,

Robert E. Mitchell, Assistant General Counsel; Edward Aptaker, Chief, Regulation Branch, Division of Litigation; Robert J. Blackwell, Public Counsel.

Washington 25, D. C.  
January 14, 1959

## BEFORE THE FEDERAL MARITIME BOARD

FMB Docket Nos. 827, 835, 841

REPLY OF PUBLIC COUNSEL TO EXCEPTIONS AND TO MOTION TO  
 REOPEN THE RECORD FOR RECEIPT OF ADDITIONAL EVIDENCE  
 —Filed March 23, 1959

## Introductory Statement

A. *The Posture of the Case*

Examiner C. W. Robinson's recommended decision in this case is, in large measure, built upon the implicit premise that this case is controlled by the Board's decision in *Banana Distributors, Inc. v. Grace Line*, 5 F. M. B. 278 (1957). There the Board found that bananas were susceptible to common carriage on Grace Line's vessels in the [fol. 484] trade from Ecuador to United States Atlantic ports, and held that Grace was a common carrier of bananas in that trade.

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Robert E. Mitchell, Asst. Gen. Counsel; Edward  
 Aptaker, Chief, Regulation Branch, Division of  
 Litigation; Robert J. Blackwell, Public Counsel.

Washington 25, D. C.  
 March 23, 1959

BEFORE THE FEDERAL MARITIME BOARD

November 9, 1959

Examiner C. W. Robinson  
 Federal Maritime Board  
 Washington 25, D. C.

Re: FMB Docket No. 827

Dear Mr. Robinson:

This refers to our letter of September 11, 1959, requesting that further hearing on reparation in this proceeding

be set at the earliest possible date, and to the reply of Mr. Giallorenzi dated September 16 opposing an early hearing. Mr. Giallorenzi's opposition is based upon the pending appeals of Grace Line and Grancolombiana and the claim that an early hearing "would result in a waste of time should the Circuit Court of Appeals disagree with the Board's rulings".

We submit that the delay requested by Grancolombiana would prejudice complainant and would deprive him of his procedural rights. We urge a prompt hearing on reparation for the following reasons:

*1. The Pendency of a Court Appeal is no Ground for a Stay.*

In its report decided June 22, 1959, the Board found that Grancolombiana violated sections 14 and 16 of the Shipping Act and ordered that such violations be discontinued. Effective September 1, 1959, Grancolombiana complied with the Board's order. Its petition to the Court of Appeals to review the Board's order requested no stay of the Board's order—although provision therefor is made in the law (5 U.S.C. 1039(b)). Consequently, the Board's findings of violations of the Act are entitled to respect until reversed by the courts and, in reliance upon such findings, complainant is entitled to pursue his claim for reparation [fol. 485] under section 22 of the Act. To stay all proceedings until the courts act would be to substitute a presumption of invalidity for the presumption of validity to which the Board's decision is entitled in proceedings before the Board.

*2. An Indefinite Stay Is Unreasonable and Would Prejudice Complainant.*

We understand that the Grancolombiana appeal to the Court of Appeals for the District of Columbia has been indefinitely postponed (at Grancolombiana's request) because of the similarity of the issues in its appeal with the issues presented by the Grace appeal to the Second Circuit. We understand that the Grace appeal will not be argued

before the spring of 1960. Although it is impossible to forecast the date when the Second Circuit will decide the case, it is likely that no decision will be handed down before the summer of 1960. After the decision is handed down, there exists the possibility of an appeal to the Supreme Court. Since the Grancolombiana appeal will remain in suspense until the Grace appeal is decided, it is doubtful that the Grancolombiana appeal will be re-activated soon. On the contrary, it is reasonable to assume that at least another year will pass before the Grancolombiana appeal is decided.

Grancolombiana has demonstrated its lack of faith in its appeal by not asking the Court for a stay. It would be outrageous to postpone the hearing on reparation indefinitely. The reparation hearing should be set now since (1) the reparation period is fixed, and (2) facts upon which the reparation claim is based are still relatively fresh in the minds of the witnesses. The delay requested by Grancolombiana would seriously prejudice Mr. Consolo and would deprive him of his procedural rights.

### 3. *The Scope of the Further Hearing*

Grancolombiana's request for delay ignores the fact that most of the evidence of damages already has been presented. Consequently, the further hearing would be relatively short. There remains only the matter of introducing (1) proof of damages from the cut-off date of the exhibits now in the record (September 25, 1958) to the date of Mr. Consolo's first shipment on a Grancolombiana vessel (on or about September 1, 1959), and (2) possible additional proof of Mr. Consolo's financial ability to have shipped the volume [fol. 486] of bananas for which damages are claimed. Complainant is anxious to complete his evidentiary presentation on these matters while records are still available and memory still reliable, and to avoid the creation of any unbridgeable gap between the record made in November 1958 and the record to be made at a further hearing.

Under section 22 of the Shipping Act, complainant is entitled to an opportunity to prove his damages. By deferring the hearing as requested by Grancolombiana, complainant would be substantially deprived of this statutory right. In effect Grancolombiana asks the Board for a stay which was not asked (and could not be had) from the Court of Appeals.

For the foregoing reasons we renew our request that the reparation hearing be set at the earliest possible date.

Very truly yours,

/s/ William J. Lippman  
Attorney for  
Philip R. Consolo

cc. Robert J. Blackwell, Esq.  
All counsel

## BEFORE THE FEDERAL MARITIME BOARD

(Rec'd FMB Nov. 16, 1959)

GIALLORENZI &amp; CICHANOWICZ

Counsellors at Law

26 Broadway

New York 4, N. Y.

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• • •

November 13, 1959

Examiner C. W. Robinson  
Federal Maritime Board  
New General Accounting Office Building  
Fifth and G Streets, N. W.  
Washington 25, D. C.

Dear Sir:

Re: FMB Docket No. 827

We acknowledge receipt of copy of a letter dated November 9, 1959 addressed to your goodself by Mr. Consolo's attorneys, Galland, Kharasch and Calkins, which is a belated attempt on their part to answer our letter of September 16.

[fol. 487] With reference to the first point raised by counsel for Consolo, while it is true that no application for a stay was made before the Circuit Court of Appeals, nevertheless Grancolombiana, with the consent of the Public Counsel, agreed to defer the appeal pending in the Court of Appeals for the District of Columbia until the Grace Line appeal was disposed of by the Circuit Court of Appeals for the Second Circuit. In fact, prior to entering into such stipulation, it was suggested by the Public Counsel that the Grancolombiana appeal be deferred until the Grace Line matter was disposed of.

In answer to the second point raised by Consolo's counsel, there is no proof offered that any delay would prejudice the complainant. It would be a useless act and certainly time consuming on the part of the attorneys, particularly

the Public Counsel's office, to be engaged on two appeals on similar issues merely for the convenience of Mr. Consolo and his lawyers.

With reference to the third point made about the scope of the future hearing, it is true that insofar as Consolo's evidence is concerned in this regard h proof is complete but there is no doubt that Grancolombiana has not even begun to scratch the surface in this regard.

Undoubtedly Consolo's belated answer to our letter of September 16, 1959 is made with tongue in cheek and with the hope that possibly Grancolombiana would consider a settlement of his claim, which certainly it emphatically has no intention of doing.

It is therefore respectfully requested that the convenience of Mr. Consolo should be subordinated until the Circuit Courts of Appeal have decided these matters.

Respectfully submitted,

/s/ R. C. Giallorenzi  
Renato C. Giallorenzi

rcg;ls

cc Galland, Kharasch & Calkins, Esqs.  
1413 K Street, N.W.  
Washington 5, D. C.

" Edward Aptaker, Esq.  
Office of General Counsel  
Federal Maritime Board  
Washington, D. C.



[fol. 488]

BEFORE THE FEDERAL MARITIME BOARD

FEDERAL MARITIME BOARD

Washington 25, D.C.

In Your Reply  
Refer to File No.

A17-7:232

November 18, 1959

Renato C. Giallorenzi, Esq.  
Giallorenzi & Cichanowicz  
26 Broadway  
New York 4, New York

Re: Docket No. 827—*Philip R. Consolo v. Flota  
Mercante Grancolombiana, S.A.*

Dear Mr. Giallorenzi:

We have received a copy of your letter of November 13, 1959, to Examiner C. W. Robinson, in which you respond to the letter of November 9, 1959, addressed to the Examiner by Messrs. Galland, Kharasch & Calkins.

Public Counsel take no position with respect either to the request made in the November 9 letter of Messrs. Galland, Kharasch & Calkins, or in your letter of November 13, responding thereto, and our acquiescence in the deferral of the prehearing conference in your suit for review is not to be taken as evidencing any position regarding the request of Messrs. Galland, Kharasch & Calkins.

Very truly yours,

/s/ Robert E. Mitchell  
Robert E. Mitchell  
Assistant General Counsel  
Division of Litigation

cc: Galland, Kharasch & Calkins  
1413 K Street, N. W.  
Washington 5, D. C.  
Examiner Robinson

[fol. 508]

IN THE UNITED STATES COURT OF APPEALS  
No. 16,366 (Consolo)

PETITION FOR REVIEW—Filed May 22, 1961

1. This is a petition for review of a portion of an order of the Federal Maritime Board ("the Board") insofar as such order denied petitioner the full relief sought. The Board's order was entered under the Shipping Act, 1916, 46 U. S. C. 801, *et seq.*, and is reviewable under 5 U. S. C. 1031 ff. This court has jurisdiction under 5 U. S. C. 1032. Venue is in this court under 5 U. S. C. 1033. The United States of America is named as a respondent under 5 U. S. C. 1034. The Board is named as a respondent under Rule 38(a) of this court.

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IN THE UNITED STATES COURT OF APPEALS  
No. 16,369 (Flota)

PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL MARITIME BOARD—Filed May 24, 1961

This is a petition to review a final order of the Federal Maritime Board (the "Board") dated March 28, 1961, and served March 30, 1961, in which the Board held in effect that petitioner violated sections 14 Fourth and 16, Shipping Act, 1916 (46 U. S. C. §§ 812, 815) during the period August 23, 1957, to July 12, 1959, and directed petitioner to pay to Philip R. Consolo "on or before 60 days from the date hereof, \$143,370.98, with interest at the rate of 6% per annum on any amounts unpaid after 60 days, as reparation for the injury caused by respondents' violation of Secs. 14 and 16 of the Shipping Act, as amended." A copy of the Board's order and report served March 30, 1961 in FMB Docket No. 827 and No. 827 (Sub. No. 1) is attached [fol. 509] hereto as Exhibit 1. A copy of an earlier Board report dated June 22, 1959, and served June 29, 1959, in Docket No. 827 et al., is attached hereto as Exhibit 2.

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[fol. 514]

## IN THE UNITED STATES COURT OF APPEALS

Nos. 16,366 and 16,369

BRIEF FOR RESPONDENTS--Filed November 6, 1961

\* \* \* \* \*

[fol. 515]

## Conclusion

We have shown that the Board upon careful consideration of all the evidence before it and the Examiner's recommended decision reasonably, rationally, and correctly sifted the opposing allegations and arguments and arrived at a just and fair award. Weight was given to the Examiner's findings and credence given to the parties where merited, and the pertinent authorities were closely followed. The Board adopted the correct measure of damages and properly applied it to the evidence at hand in reaching its decision. Neither Consolo nor Flota have presented facts [fol. 516] or arguments which detract from the correctness of the Board's reparations award, and their petitions (Nos. 16,366 and 16,369) should therefore be dismissed.

Respectfully submitted,

James L. Pimper, Acting General Counsel;

Lee Loevinger, Assistant Attorney General Anti-trust Division;

Robert E. Mitchell, Assistant General Counsel;

Richard A. Solomon, Attorney, Department of Justice;

Robert J. Blackwell, Thomas D. Wilcox, Attorneys  
for Federal Maritime Commission (successor to  
Federal Maritime Board).

Washington, D. C.

November 6, 1961

\* \* \* \* \*

[fol. 525]

## BEFORE THE FEDERAL MARITIME BOARD

FMC Docket Nos. 827 and 827 (Sub. No. 1)

## PETITION TO REOPEN—Filed June 7, 1962

This petition to reopen is filed in behalf of respondent Flota Mercante Grancolombiana, S. A. ("Flota"). On March 28, 1961, the former Federal Maritime Board issued a report and order in the above proceeding directing Flota to pay complainant Mr. Philip R. Consolo ("Consolo"), a banana importer, \$143,370.98 plus certain interest, as reparation for damages claimed by Consolo as the result of alleged unlawful denial of reefer space on Flota's vessels prior to 1959. On April 26, 1962, following petitions for review by both Consolo and Flota, the United States Court of Appeals for the District of Columbia denied Consolo's claim for additional reparations, set aside the former Federal Maritime Board's order directing Flota to pay reparations, and remanded the matter to the Commission as the Board's successor, for further proceedings. The purpose of this petition is to request the Commission to initiate the further proceedings contemplated by the Court's order and to request that such further proceedings also include reopening (a) for the taking of additional evidence on the matters specified hereinafter; and (b) for the purpose of reconsidering the remaining issues not passed [fol. 526] upon by the Court, dealing with calculation and mitigation of damages. Flota also requests leave to file a further brief and present oral argument to the Commission on the existing record, if the matter is not referred to an Examiner for further evidence.<sup>1</sup>

## Statement in Support of Petition

\* \* \* \* \*

2. Flota believes that the present record before the Commission is already more than sufficient to require a finding

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<sup>1</sup> We assume that if further evidence is taken there will be opportunity for further briefs and arguments as a matter of course.

that it would be inequitable to award any reparations to Consolo. The Court of Appeals explicitly stated that "Flota marshaled substantial evidence in support of its contention" (Op. page 17), and that the former Board "failed to give adequate consideration to this issue". Nevertheless, to fully demonstrate the unfairness of forcing Flota to pay reparations, Flota believes it necessary to submit additional evidence on the points specified below, including evidence of the later events to which the Court referred.

\* \* \* \* \*

5. Specifically, in this connection Flota is informed and believes and requests that the record be reopened to permit it to prove, that following the Board's order of June 29, 1959, requiring Flota to open its space to all qualified shippers, those shippers who contracted for space on Flota's vessels, including Consolo, themselves recognized the problems involved from use of Flota's reefer facilities by multiple shippers and combined to act as a single unit in importing, discharging, and selling bananas, i.e., in effect to act as a single shipper; that this arrangement included the purchase and loading of bananas in Ecuador, with the possible exception of one shipper, and continued until mid-1961; that even this arrangement did not enable the shippers profitably to employ Flota's facilities; and that their actions and events during the 1959-61 contract period and subsequent thereto have proved that there was justification for Flota's belief that its facilities were not reasonably [fol. 527] adaptable for use by multiple shippers and that in fact Flota was correct and the Board was mistaken.

6. Flota is further informed and believes and requests opportunity to prove by such later events that after Flota opened its space the shippers actually utilizing that space incurred losses, as opposed to the hypothetical profits Consolo claimed he would have made if he had had space during the reparation period. These facts bear upon both the inequity of awarding reparations to Flota and the claimed fact of damage.

7. In this connection Flota further wishes to prove that although the rates and conditions in the 1961 renewal contract were substantially the same as those during the 1959-61 period, Consolo refused to renew that contract on the stated ground that the rate was unrealistic, voluntarily relinquished his space on Flota's vessels, and no longer utilizes Flota's service.

8. Flota believes that the matters referred to above, not available to the Board in its June 1959 report, strongly reinforce its contention as to the operational limitations upon use of its reefer facilities by multiple shippers and its contention that to force it to pay Consolo reparations for denial of space when he lost money after he obtained the space, would be inequitable to Flota.

\* \* \* \* \*

11. The inequity of the Board's measure of damages in the circumstances here is emphasized by the fact that the evidence submitted by Consolo and relied upon by the Board did not in fact reflect the actual price Consolo would have had to pay for bananas if he had space on Flota's vessels, or the actual cost Consolo would have incurred in transporting such bananas on Flota's vessels. As to the former, the figures relied upon by the Board were the cost of bananas purchased for movement on Grace Line vessels from Ecuador ports not served by Flota. The Board thus overlooked or disregarded testimony of record that the cost of bananas in the areas served by Flota's vessels, Puerto Bolivar and Guayaquil, was higher than that in Grace Line's loading vessels (Puna) (178, 180-181, 183). [fol. 528] Flota now requests the Commission to reopen the record to permit it to prove by the actual experience of Flota's shippers, including Consolo, during the 1959-61 contract period that the cost of bananas in the Puerto Bolivar zone served by Flota is and during the reparation period was in fact higher than the banana cost data submitted by Consolo and relied upon by the Board. Flota further wishes to prove that the bananas actually purchased by Flota's shipper, Panama Ecuador, during the reparation period

cost on the average of 22 cents per stem higher than those moved by Grace Line from other areas reflected by the data submitted by Consolo and relied upon by the Board. By this factor alone the vacated reparation order was overstated by approximately \$43,000.

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14. The banana cost data and freight rates discussed above are also pertinent if the Commission should determine that the measure of damages employed by the Board is proper and equitable in the circumstances of this case. In such event these data are vital to show that even under that measure the Board's calculation was in error.

15. Moreover, the following is also important. The claimant here is an individual, Philip R. Consolo. But Mr. Consolo admitted that except for a few shipments on the Chilean Line, during the reparation period he conducted his banana business not as an individual, but through a number of corporations (2118). The bananas shipped in Consolo's Grace Line space during the reparation period were purchased in Ecuador, not by Consolo but by an Ecuadorian corporation called Ecuador Fruit Company, which sold them to a Panamanian corporation called Darien Refrigerated Shipping Company, which then sold them to a Delaware corporation called Dover Banana Company, which Consolo permitted to use his Grace Line space in return for buying bananas from the Darien company. The bananas were then sold for the account of Dover by R. Dixon & Company, a commission agent (324-26, 329-31, 333-42, 345-48, 350-51, 357). Consolo is the majority stockholder of Ecuador Fruit Company and of Darien; and a stockholder of Dover. It is impossible from the present record to determine through the maze of intercorporate transactions the total costs actually involved, what profit, if any, Consolo himself made in the bananas shipped via Grace Line, and could reasonably be expected to make via Flota's vessels, and how much of the claimed profit inured to others, because the Examiner erroneously refused to permit Flota to develop facts as to the actual operations and financial

results of these companies' operations, the actual expenses involved to the Consolo interests in importing bananas or Consolo's actual profit or loss through such operations (1903-06, 1918, 2123-27). These facts are highly material if the Board's theory of damages is correct, and indeed bear also on whether it would be equitable to apply that measure, or to force Flota to pay the individual Consolo any reparations at all. We therefore request the record be reopened to permit the facts to be developed concerning these matters.

16. Flota also requests that the Commission reopen the record to take evidence with respect to (a) the use of chartered vessels by Consolo during the reparation period and subsequent to the last hearings herein, to show the extent to which Consolo himself has chartered vessels to carry bananas to Atlantic United States and Gulf coast ports and could have chartered vessels to mitigate claimed damages during the reparation period. Flota is informed and believes that Consolo has chartered vessels for the carriage of bananas to such ports; (b) the investment or other expenditures Consolo was required to make in order to engage in the importation of bananas on Flota vessels under his 1959 contract. Flota believes that reopening of the record may disclose such expenditures by Consolo which should be reflected as further deductions in Consolo's claim for damages; (c) whether Consolo has any agreement with any person or entity relating to the sharing, directly or indirectly, of any recovery which may result from these proceedings. Flota is informed and believes that there is such an agreement; (d) other activities engaged in by Consolo during the reparation period, made possible by the fact he was not then engaged in shipping bananas by Flota, which should be considered in mitigation of his claim for damages.

[fol. 530]

#### Conclusion

It is impossible to specify in this motion all of the evidence to be adduced in connection with the above matters but those matters are decidedly relevant. Flota therefore



respectfully requests that the Commission reopen the record herein for the purposes of taking evidence on the matters above discussed, for consideration of the specific issues directed by the Court, and for reconsideration of the other issues not decided by the Court. If further evidence is not taken, Flota requests leave to file further briefs and to present oral argument to the Commission.

Respectfully submitted,

Odell Kominers, J. Alton Boyer, 529 Tower Building,  
Washington 5, D. C., Attorneys for Flota  
Mercante Grancolombiana, S.A.

June 7, 1962.

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BEFORE THE FEDERAL MARITIME BOARD

Served July 6, 1962      FMC Docket No. 827 (Sub. No. 1)

NOTICE OF REOPENING OF PROCEEDING—July 3, 1962

On March 30, 1961, the Federal Maritime Board after notice and hearing served an order in Docket No. 827, directing Flota Mercante Grancolombiana, S. A. (Flota) to pay to Philip R. Consolo (Consolo) the amount of \$143,370.98 as reparation for injury suffered because of Flota's violation of sections 14 and 16 of the Shipping Act, 1916 (46 U.S.C. 812 and 815). The Board's reparation order, and its earlier order of June 22, 1959, which found that Flota violated the Shipping Act, were the subject of three petitions for review filed by Flota and Consolo in the United States Court of Appeals for the District of Columbia Circuit (cases Nos. 15,330, 16,366 and 16,369).

[fol. 531] On April 26, 1962, the Court affirmed the Board's order of June 22, 1959, but set aside and remanded to this agency (as the Board's successor) the reparation order of March 30, 1961, stating:

" \* \* \* we shall remand to the agency to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequi-

table to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board."

On June 8, 1962, Flota Mercante Grancolombiana, S.A. petitioned the Commission for the reopening of this docket for the purpose of taking additional evidence and for reconsideration of the reparation award. Complainant Philip R. Consolo replied to Flota's petition on June 25, 1962, opposing the taking of additional evidence. We are of the opinion that the taking of further evidence is not required nor warranted in this proceeding.

It Is Therefore Ordered, That the petition of Flota be denied insofar as it requests reopening the proceeding for additional evidence.

It Is Further Ordered, That Docket 827 (Sub. No. 1) be reopened for reconsideration of reparations upon the existing record; that such reopening shall be limited to the receipt of briefs and oral argument, with any fact relied upon by either party to be specifically identified by reference to the place in the record where found; that opening briefs shall be simultaneously filed by the parties with the Secretary, Federal Maritime Commission in Washington, D. C., on or before the close of business on July 31, 1962; and that reply briefs may be filed within ten days after the date of filing opening briefs.

By order of the Commission, July 3, 1962.

Geo. A. Viehmann, Assistant Secretary.

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[fol. 540]

BEFORE THE FEDERAL MARITIME BOARD

FMC Docket No. 827 (Sub. No. 1)

RESPONDENT'S REPLY BRIEF UPON REMAND AND  
RECONSIDERATION—Filed August 31, 1962

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[fol. 547] In April 1958, Panama Ecuador faced a crisis in its banana importations via Flota. An unusually large

proportion of bananas—everybody's, not just Panama Ecuador's—were arriving in the United States in diseased or damaged condition and there had been a considerable drop in the banana market in the United States since January 1958 (431-32; Exs. 19, 101). In mid-April, Panama Ecuador's representative in Guayaquil claimed the right to invoke and threatened to invoke a "force majeure" clause under its contract with Flota, "until such time as these conditions disappear" (Ex. 101). Flota's manager in Guayaquil, referring in part to "the sudden drop of the banana price in the North American market", advised Flota on April 17, 1958 that

"As a personal commentary, Mr. Zevallos wishes to inform the General Manager that he confirms his opinion that this case deals with a financial problem; that such is a serious problem because, while it is true that Grancolombiana could prove the nonexistence of the 'force majeure', it is also true that, after collecting the guarantee for non-compliance with the contract, we would be facing a still graver problem, such as finding shippers interested in leasing the refrigerated space in our vessels; anything that could be gotten would require a great deal of time which would involve further losses to Grancolombiana than those which would have to be withstood with the agreement approved by the General Administration (Management)." (Ex. 101, p. 6).

[fol. 562]

BEFORE THE FEDERAL MARITIME BOARD

Served September 18, 1963

FMC Docket No. 827 (Sub. No. 1)

On rehearing on remand complainant found injured to the extent of \$106,001.00 by respondent's refusal to allocate, between August 23, 1957 and July 12, 1959, refrigerated space on respondent's ships for the carriage of bananas and reparation in such amount awarded.

*Robert N. Kharasch, William H. Lippman and Amy Scupi* for complainant.

*Odell Kominers and J. Alton Boyer* for respondent.

REPORT—September 16, 1963

By the Commission (John Harllee, Chairman. Ashton C. Barrett, James V. Day, John S. Patterson, Thos. E. Stakem, Commissioners):

Pursuant to remand by the United States Court of Appeals for the District of Columbia Circuit,<sup>1</sup> this matter was reheard for the purpose of reconsidering the order of our predecessor, the Federal Maritime Board, directing respondent, Flota Mercante Grancolombiana, S.A. (Flota), to pay reparations to complainant, Philip R. Consolo (Consolo).

[fol. 563] On June 22, 1959, the Board in Dockets 827, 835 and 841<sup>2</sup> found that Flota had violated sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916, by excluding Consolo and another qualified banana shipper (Banana Distributors) from participation in the refrigerated space on its common carrier vessels in the trade between Ecuador and the United States and allocating all such space to a single shipper, Panama Ecuador. On March 30, 1961, the Board in Docket 827 (Sub. No. 1) entered on behalf of Consolo the reparation order here under reconsideration, in the amount of \$143,370.98. No interest was allowed in this award but interest at 6 percent per annum was granted on any amount not paid by Flota 60 days after the Board's order. This supplanted an Examiner's decision which had awarded Consolo \$259,812.26 as reparations.

On appeal, the Court had before it two petitions by Flota, one attacking the Board's finding that it had violated the

<sup>1</sup> *Flota Mercante Grancolombiana, S.A., et al. v. F.M.C. and U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962).

<sup>2</sup> *Philip R. Consolo and Banana Distributors, Inc. v. Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633 (1959).

Shipping Act, the other attacking the reparation order, as well as a petition by Consolo attacking the reparation order. The Court sustained the Board's finding of violations and upheld its denial of Consolo's claims for pre-award interest, for an earlier starting date for the reparation period, and for an upward revision in the amount of space he would have been allocated if permitted to ship on Flota's vessels. However, the Court set aside the Board's reparation order and remanded it to the Commission to consider—

\* \* \* whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.

The Court prefaced this language with a discussion of Flota's argument that it would be "inequitable" to award reparations because of the following factors:

1. The then "unsettled nature of the law" as to whether a violation had occurred.

[fol. 564] 2. The possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace Line, the carrier in a recent case dealing with similar issues, due to factual differences, *i.e.*, the physical characteristics of Flota's vessels and difficulties and delays in loading if more than one shipper were to use its banana space.

3. The Board's delay in deciding a petition for declaratory order sought by Flota (Docket 835).

4. Flota's "possible liability" for breach of the exclusive contract which it had signed with Panama Ecuador, one of Consolo's competitors, for what Flota may have thought "a reasonable period of time" in light of the Board's decision in a prior banana case involving Grace Line.

5. Consolo's apparent failure to utilize all of the banana space already available to him on Grace Line vessels.

The Court stated that the Board "took up most of these points individually and disposed of them briefly", and went on to say—

But the essence of Flota's argument was that the cumulative weight of all of the circumstances, and not any one circumstance, rendered it inequitable to require reparations. We are not prepared on appeal, to go this far; but we do consider \* \* \* that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to grant reparations once it found a violation of the Act, or (2) that all of the issues as to the reasonableness or equity of Flota's conduct were determined in the first phase of the proceeding.

### Discussion and Conclusions

The Commission recognizes, and we think the Board did, that section 22 of the Shipping Act does not require the award of reparations when a violation has been found. The language of the section is that we "may" direct the payment of "full reparation" for injury caused by the violation. This is permissive, hence the mere fact that a violation of the Act has occurred does not in itself compel a grant of reparations. We believe, also, that in granting reparations [fol. 565] the Board took account of all the circumstances. But in any case we have made our own thorough review of this matter and have concluded that Consolo is entitled to reparations, though in an amount smaller than the Board awarded. In so concluding, we have not only reexamined the record but have considered the contentions of the parties including the arguments set forth in their briefs submitted on remand, and have particularly weighed the individual and cumulative effect of the factors mentioned by the Court as they bear on the equities.

First, we discuss the "unsettled nature of the law" in May 1957, at the time Flota executed a renewal contract allocating all of its available banana space to Panama Ecuador for three years, thereby excluding Consolo (and

others) from its vessels. Shortly prior to this, in April 1957, the Board in *Banana Distributors, Inc. v. Grace Line*, 5 F.M.B. 278, had held that Grace Line's practice of contracting all of its banana space to three shippers to the exclusion of other qualified shippers was unjustly discriminatory and unduly and unreasonably prejudicial in violation of sections 14 (Fourth) and 16 (First) of the Act. And four years earlier, in *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953), the Board had held the same thing after a full review of the problems attendant upon the transportation of bananas and of Grace's contention that it was not subject to common carrier obligations with respect to this commodity.

Grace "satisfied" the complaint in the 1953 case but after the 1957 decision it appealed. The Board's order was reversed and remanded in 1959 by the Second Circuit Court of Appeals due to the Court's disagreement with a test—namely, that bananas "are susceptible to common carriage"—which the Board had advanced in dealing with Grace's argument that Grace was, and because of the special conditions involved in banana transportation, could only be a contract carrier of the fruit. The Court refused at that time to consider the Board's contention that a common carrier [fol. 566] for the public generally cannot also carry "a particular commodity on a contract basis".<sup>3</sup> On reconsideration pursuant to this remand, the Board eliminated any reference to the "susceptibility test" and reached the same result it had reached earlier. The Board held that Grace was a common carrier by water under the Shipping Act and could not evade the requirements of the Act as to any part of the goods it carried. On appeal the Second Circuit in 1960 affirmed this decision and the Supreme Court refused review.<sup>4</sup>

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<sup>3</sup> *Grace Line, Inc. v. Federal Maritime Board*, 263 F.2d 709 (CA 2, 1959).

<sup>4</sup> *Banana Distributors, Inc. v. Grace Line*, 5 F.M.B. 615 (1959), aff'd *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (CA2, 1960), cert. denied 364 U.S. 933 (1961).

We must judge Flota's protestations of innocent intent in the context of the circumstances as they existed in May 1957 when it executed the three-year renewal of its exclusive contract with Panama Ecuador and it is evident from the foregoing that Flota executed that contract in contravention of two Board decisions directly in point. In both instances the Board had held that Grace was a common carrier of bananas and had declared illegal its attempts to exclude qualified banana shippers from its vessels. The Board had ruled, also, that forward booking arrangements for transportation of the fruit for a period not exceeding two years were reasonable provided the available space was prorated among all qualified banana shippers who desired it.<sup>5</sup> Of course, the courts could alter these decisions, [fol. 567] and to that extent they did not "settle" the law. But they were authoritative pronouncements by the agency with prime responsibility in the field and we fail to see why shippers should be penalized because Flota chose to ignore them and sign a three-year exclusive contract. Moreover, while Grace appealed the Board's 1957 order, the order was not stayed and remained valid pending the outcome of the appeal which neither Flota nor anyone else knew would succeed—as it temporarily did in 1959.

Flota argues that if it accepted Consolo's demands for space it might have been faced with litigation for breaching its contract with Panama Ecuador. But a provision in

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<sup>5</sup> Bananas are plentiful in Ecuador, and the amount of bananas a shipper can sell depends solely on the current market for the product and the amount of space he can acquire for transporting them. The fruit is, however, highly perishable and must be carried in refrigerated compartments to prevent rapid ripening. Through forward booking arrangements the shipper is able to contract for a fixed amount of carrier space for a specific period of time. Such an arrangement permits the shipper to purchase bananas with the knowledge that vessel space is available for carrying them. During the period of the forward booking contract, other shippers, not party to this arrangement, are foreclosed from any space. In the 1957 *Grace* case forward booking arrangements for a two-year period were approved but only if a reasonable proration of space was made to all qualified shippers who desired it and were prepared to meet the terms of the forward booking contract.



that contract absolved Flota of any liability in the event the contract was declared illegal or unenforceable. Although this provision might have put Flota in the position of having to defend the *Grace* decisions and assert their application to the Panama Ecuador contract, it is not unreasonable to think that one acting in good faith would choose such a course. Flota consciously chose the opposite course and we can only conclude that it did so because it preferred the advantages of its long-term, exclusive arrangement with Panama Ecuador.

In so acting, Flota violated its common carrier duty, as repeatedly declared by the Board, to carry goods for all qualified shippers. Even if Flota thought the Board would be reversed, one who acts in contravention of a statute, court or administrative ruling, in the belief that it will be declared invalid, assumes a calculated risk. If the law which he contravenes is upheld, he must face the consequences. Flota is not facing but is seeking to escape the consequences by passing the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity.

We next deal with the possibility that Flota "in good faith believed" its situation was distinguishable from that of *Grace*. Flota argues that its ships were not adaptable for loading and unloading and points out that when in 1959 it did open its space to several shippers, they combined into a single corporation, the Continental Banana Company, [fol. 568] to act as a single shipper in the stevedoring, importation and marketing of bananas. But this goes to refute Flota's argument rather than support it because it shows that means were available to solve the problem of accommodating several shippers. Instead of a good faith exploration of such means, Flota, we think, simply preferred its existing one-shipper arrangement.

It would be safe to assume that every vessel in the banana trade is not exactly the same, structurally. To rely upon their structural differences as an excuse to avoid common carrier obligations would go far toward eliminating such obligations. Thus, legal precepts based on activities of a

similar carrier, a similar contract, the same commodities, and the same trade, could be overridden by claiming structural differences in the ship. Nor is a refusal to carry goods for many justified by fear that they cannot cooperate in using the available space. Whether shippers can cooperate will never be known unless they are offered space. It is the common carrier's duty to offer the space and give shippers the chance to devise cooperative means of using it. In the final analysis the possibility of cooperation is one to be assessed by the individual shippers, and not the carrier. If multiple utilization is truly impossible, we think shippers will recognize this and accept the fact that the space can only be utilized on an exclusive basis.

Regarding the question of the Board's delay in deciding Flota's petition for declaratory order, we first point out that Flota brought this petition only under threat of a formal complaint by Consolo, which complaint Consolo actually filed two weeks after the petition. Flota had already violated the Act as interpreted by the Board when it filed its petition, hence it did not, in fact, seek the Board's assistance in governing its conduct. Its resort to the Board was under pressure of the troubles it had invited by executing a three-year renewal of its exclusive contract with Panama Ecuador, in complete disregard of everything the Board had said on the subject. Again, judging Flota's claim in proper context, we are unconvinced of its good faith.

[fol. 569] More importantly, however, Consolo's complaint, unless satisfied, was required to be investigated and determined by the Board under section 22 of the Shipping Act, 1916, regardless of the disposition it made of Flota's petition. And in the exercise of its discretion under section 5(d) of the Administrative Procedure Act (A.P.A.), the declaratory order provision (5 U.S.C. 1004(d)), the Board not only did not have to accord Flota's petition priority of consideration, it did not have to consider the petition at all. It might well have adjudicated the matter on the basis of Consolo's complaint and the one later filed by Banana Distributors, as being the more appropriate and effective

procedure for handling the issue involved. Thus, the Attorney General's Manual on the A.P.A. states at p. 60 that an agency need not issue declaratory orders—

\* \* \* where it appears the questions involved will be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances.

See also *Western Air Lines v. C.A.B.*, 184 F. 2d 545 (CA-9, 1950) with respect to the wide discretion an agency has in choosing the means to dispose of the business before it.

Even standing alone, Flota's petition would have offered no promise of a speedy resolution of the controversy. Under section 5 of the A.P.A., such a petition must be determined on the record after notice and opportunity for agency hearing.<sup>6</sup> In filing the petition Flota conceded nothing. It took the position that its vessels were different structurally from Grace's vessels and as a practical matter they could only accommodate a single banana shipper.<sup>7</sup> Flota's assertion of this position, which was sharply disputed by the [fol. 570] aggrieved shippers, led to a complex and lengthy hearing into the physical characteristics and utilization of its vessels so far as the banana trade was concerned. Flota made the contention notwithstanding the in-depth probing of the special conditions of banana carriage including multiple shipper problems, which had occurred in the *Grace* cases. It hoped somehow to avoid those cases. Flota had a right to attempt this but any possibility of a prompt disposition of the controversy was thereby precluded, no matter what form the adjudication took.

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<sup>6</sup> 5 U.S.C. 1004; see also Attorney General's Manual on the A.P.A., p. 59 and Rule 10(i), FMC Rules of Practice and Procedure.

<sup>7</sup> Flota also contended during the course of the proceeding that it was not a common carrier of bananas, that even if it was it had not prejudiced or unjustly discriminated against shippers, and that it had not violated the Act.

Clearly, there is no substance to Flota's argument that its petition should have been determined independently of the complaints filed by Consolo and Banana Distributors, or that this would have expedited resolution of the dispute. Flota suffered no prejudice through the consolidation of its petition with complaints involving the identical controversy. We think the Board was entirely reasonable in exercising its discretion in this respect.

Nor is there any support for the suggestion that there was Board delay in the actual handling of the controversy, for which Flota is being made to pay reparations. The consolidated proceeding took about two years to terminate, and Flota meanwhile continued its advantageous Panama Ecuador arrangement. Panama Ecuador itself participated in the case, arguing along with Flota that the physical limitations of the vessels foreclosed their use by more than one banana shipper.

The record of the proceeding reflects that numerous requests for postponements were made and that Flota either authored or favored most of these. If there was any disposition on its part for a prompt determination, this cannot be discerned. For example, Flota asked for and obtained delays in answering Consolo's complaint and in the time set for the first prehearing conference; it joined in putting the hearing off to a date four months after that prehearing; and it then moved for a further delay of over two months in the hearing date. The hearing thus did not begin until a year after the filing of Flota's petition and Consolo's complaint. Whatever else may be said in justification of these delays, they cannot be explained on the ground that Flota was seeking "prior action" on its petition. The delays were in no sense caused by the Board. Indeed, in rendering their decisions the Examiner and the Board acted with what may be termed unusual dispatch, considering the controversial nature and size of the record.<sup>8</sup>

<sup>8</sup> The Examiner's decision was rendered three weeks after he received the parties' briefs; the Board's six weeks after it heard the oral argument.

Turning now to Flota's allegation that under the Board's decision in the *Grace* case it believed its forward booking contract with Panama Ecuador was for a reasonable period of time, we find it impossible to understand how Flota could have held any such belief. The 1957 *Grace* decision authorized forward booking for not to exceed two years, whereupon Flota executed a renewal of the Panama Ecuador contract for three years. That decision also set forth the criteria for valid forward booking contracts, making it quite clear that such an arrangement must provide "a reasonable opportunity for prospective shippers to engage in the trade" and the available space must be fairly prorated among qualified shippers. The duration of the contract is not even relevant until this latter requirement has been satisfied. Flota made no attempt to prorate its available space among qualified shippers. Instead, the space was offered and contracted to one shipper on an exclusive basis and this was illegal, apart from the period of time which the contract covered.

The final point to which we were directed to give further consideration involves Flota's contention that Consolo's failure to use all of his available space on Grace Line ships should reduce the reparations assessed in his favor. In arriving at its reparations figure, however, the Board did take account of this factor, and its award reflects this consideration.

There are certain periods during the year when the market for bananas drops, importers reduce their purchases and shippers naturally reduce their shipments to reflect the declining market. This is an industry-wide condition, so that at the same time Consolo was not fully utilizing his space on Grace Line, Panama Ecuador was not filling Flota's vessels nor were other shippers in the trade making full use of their available space.

[fol. 572] The Board's reparation award was computed as follows: For each voyage made by Flota during the reparation period (Panama Ecuador, of course, being the only banana shipper), there was figured, for the actual number of bananas carried, the price received by Panama

Ecuador upon the sale of the bananas less its cost of purchasing them. From this figure was deducted shipping and handling expenses such as freight and stevedoring, to arrive at the net profit or loss for the bananas shipped on each voyage.

Not every voyage was profitable and during the slack periods referred to above, particular voyages resulted in a negative or loss figure. The Board took account of the losses by making appropriate deductions from the profits, thereby compensating for the periods when Consolo could not have used all of the space on Flota's vessels to which he was entitled. The relevant exhibits reflect the industry-wide lag in the market for bananas and show a very close correlation between the periods when Consolo was not using all of his space on Grace vessels and the periods when Panama Ecuador's shipments on Flota occasioned a loss.

The Board found (and the Court sustained its finding) that an equitable proration of space to Consolo during the reparation period would have been 18.46% of the total. Thus, to determine Consolo's reparations because of being denied its just proration of space, 18.46% of the net profit (adjusted for losses as above described), was taken and the resulting figure was awarded by the Board as reparations.

In mitigation of the Board's award Flota also urges upon us Consolo's failure to charter vessels and his failure to use space available on the Chilean Line. These points are not tenable. We agree with Consolo that it would have been a hardship for him to charter ships in order to ply his trade, and we think it unreasonable to contend he should have done so in the circumstances. Flota does not make clear what ships were available for charter; or that Consolo could have used them; and if he could, on what terms. As to the Chilean Line, it has been shown, to our satisfaction, that Consolo did exert efforts to ship thereon and did, in [fol. 573] fact, make several such shipments late in 1958. This arrangement was terminated by the Chilean Line, however, and not by Consolo.

There are other factors and charges which were taken into account in determining the Board's award which we

have reexamined and we agree that certain adjustments should be made as urged by Flota. In light of the evidence presented, the freight rate of \$34 per ton of bananas charged by Flota to Consolo in 1959, when Consolo was one of several shippers via Flota, appears to be a fairer figure for computing the reparations than the rate of \$30.23\* per ton Flota had charged its exclusive shipper (Panama Ecuador) for all of the banana space during the reparation period. The Board used the \$30.23 rate in its computation.\* We think Flota would not have continued this rate when faced with the situation of accommodating multiple shippers because operational costs increase when more than one shipper uses the available space. It seems to us the rate of \$34 per ton actually charged by Flota when allocating space to several shippers, is more representative of the figure it would have charged had it allocated space to more than one shipper during the reparation period. It may be noted, also, that during the reparation period Consolo was one of several banana shippers using Grace's vessels and Grace charged him \$36 per ton.

Finally, while we agree with the Board that the stevedoring costs at Philadelphia rather than New York were proper, since Flota served Philadelphia and not New York, the Board inadvertently erred in not figuring an increase in stevedoring costs instituted September 25, 1958 in Philadelphia. This amounted to 9.95 cents per stem and is taken into account, along with the revised freight rate above-mentioned, in our computation of reparations.

[fol. 574] Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959 yielding a total gross profit of \$2,513,236.43 (after

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\* See errata sheet at p. 515.

\* In determining its reparation figure, the Board computed freight on the basis of 1.134 cents per stem of bananas, which was the rate charged by Flota to Panama Ecuador, its exclusive shipper, during the reparation period. Bananas average 75 pounds per stem, hence the freight rate per ton used by the Board was \$30.23. Our use of the \$34 per ton rate increases the amount attributable to freight charges and reduces the reparation figure.

adjustment for negative or loss figures on some voyages), and the subtraction therefrom of total freight amounting to \$1,353,139.65 and stevedoring and incidental expense amounting to \$585,876.87,<sup>10</sup> the net profit for the 98 voyages is \$574,219.91, of which Consolo is entitled to 18.46% or \$106,001.00.

In our opinion this constitutes the legally and mathematically correct measure of damages in this case. We agree with the Board, as apparently did the Court, that no single "equitable" argument belatedly raised by Flota justifies departing therefrom. Flota, however, has stressed the cumulative weight of its arguments as the basis for equitable relief. Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith, and we have been unable, except as noted, to find any equity in its contentions whether viewed separately or together. But even if that were not so the question would arise as to how we could equitably recognize the cumulative circumstances urged by Flota.

Could we define the equities in dollars and cents? Could we say that equity dictates that a legally and mathematically correct reparation figure be reduced by some unknown and arbitrary percentage such as a third, half, or perhaps all? We think not. It is, in any event, clear to us that by this stage of this prolonged controversy Flota's position has received all possible recognition, as evidenced by the fact that the reparation figure has been successively reduced so that it is now substantially less than half the amount the Examiner awarded Consolo several years ago.

[fol. 575] An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of \$106,001.00, with interest

<sup>10</sup> This figure is obtained by adding the amount of \$53,641.94 for the increase in stevedoring costs at Philadelphia between September 25, 1958 and July 12, 1959, to the \$532,234.93 which the Board determined for stevedoring and incidental expense (539,115 stems times 9.95 cents equals \$53,641.94).



at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission September 16, 1963.

Thomas Lisi, Secretary.

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BEFORE THE FEDERAL MARITIME BOARD

FMC Docket No. 827 (Sub. No. 1)

ORDER DIRECTING PAYMENT OF REPARATIONS—  
Filed September 16, 1963

This proceeding having been remanded by the United States Court of Appeals for the District of Columbia Circuit (*Flota Mercante Grancolombiana, S.A., et al. v. F.M.C. and U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962)), and the Commission having considered the Court's opinion and duly reexamined the entire record and the briefs of the parties submitted on remand, and having on the date hereof made and entered a Report setting forth its findings and conclusions on remand, which Report is hereby referred to and made a part hereof:

It Is Ordered, That respondent Flota Mercante Grancolombiana, S.A., be and it is hereby directed to pay to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, \$106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission, September 16, 1963.

Thomas Lisi, Secretary.

(Seal).

[fol. 576]

## BEFORE THE FEDERAL MARITIME BOARD

Served October 9, 1963

FMC Docket No. 827 (Sub. 1)

## ERRATA SHEET—October 8, 1963

The following corrections are hereby made in the Commission's Report served September 18, 1963:

- (1) On page 12 the figure "\$30.23" is substituted for the figure "\$22.54" wherever the latter appears;
- (2) On page 12, footnote 9, the figure "\$1.134" is substituted for the figure "84.56 cents".

October 8, 1963

Thomas Lisi, Secretary.

[fol. 577]

## IN THE UNITED STATES COURT OF APPEALS

Nos. 18,230, 18,235

## FURTHER SUPPLEMENTAL CERTIFICATION OF RECORD BY FEDERAL MARITIME COMMISSION—March 6, 1964

Pursuant to an order of this Court dated February 13, 1964, the Federal Maritime Commission was directed to file a supplemental record consisting of the official minutes of the Federal Maritime Board and the Federal Maritime Commission in their Dockets 827, 827 (Sub. No. 1), 835, and 841.

I hereby certify that the attached documents are copies of the official minutes which are and will be held in the custody of Thomas Lisi, Secretary, custodian of such records for the Federal Maritime Commission, for and on behalf of the Clerk of this Court, pursuant to the provisions of Rule 38(g) of the Rules of the United States Court of Appeals for the District of Columbia Circuit.

All matter in addition to the above minutes, which was required by the Court's order of February 13, 1964 to be included in its supplemental record, has already been certified by the Commission as part of the record herein, in a Supplemental Certification of the Record filed January 6, 1964.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Maritime Commission to be affixed, on the 6th day of March, 1964.

Thomas Lisi, Secretary, Federal Maritime Commission.

[fol. 578]

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BEFORE THE FEDERAL MARITIME BOARD

OFFICIAL MINUTES—(EXCERPTS)

Proceedings of the Federal Maritime Board

May 1, 1958.  
(Regular Meeting)

Present: Chairman Morse and Member Stakem, a quorum. Vice Chairman Guill absent.

Also Present: E. R. Seaver, General Counsel; V. L. Russo and E. S. Shulters, of the Office of Ship Construction (entered the meeting at 8:50 A.M.); V. W. Mayer, of the Office of Ship Construction (entered the meeting at 9:00 A.M.); J. F. Harrell, Assistant General Counsel (entered the meeting at 9:00 A.M.); James L. Pimper, Secretary; and G. A. Viehmann, Assistant Secretary.

Appearances: Representatives of The Ingalls Shipbuilding Corporation; Monro B. Lanier, Vice Chairman of the Board (entered the meeting at 9:00 A.M. and withdrew at 9:40 A.M.); D. W. Strickland, Vice President-General Counsel; J. M. Dickins, Manager, Change Order Department; and W. K. Ehrlich, Chief Electrical Engineer; (all entered the meeting at 9:00 A.M.).

The Board convened at 8:35 A.M. and adjourned at 9:55 A.M.

Flota Mercante Grancolombiana, S.A.—Petition for declaratory order—Consolidation of hearing with Docket No. 827.

There was presented the following memorandum dated April 22, 1958, from the Chief, Regulation Office:

“SUBJECT: Flota Mercante Grancolombiana, S.A.  
Petition for Declaratory Order

“A petition for a declaratory order was filed by Flota on October 31, 1957, praying the Board to determine the validity of current contracts between it and two shippers of bananas moving from Ecuador to the United States. An amendment to that petition was filed on April 17, 1958. The contract for movements to the Gulf expires May 31, 1958, and the other, to the Atlantic, July 19, 1960. The petition states that after the decision of April 29, 1957, in the Grace Line case (Nos. 771 and 775) numerous firms and individuals have sought to use the space which is committed under the aforementioned contracts. The amendment indicates the contract for movements to the Gulf was executed July 2, 1957, effective June 1, 1957, and the one to the Atlantic on May 22, 1957, both on the basis of bids submitted by prospective shippers. Petitioner has had contracts with its shipper to the Atlantic and predecessor since 1955.

[fol. 579] “Petitioner distinguishes his vessels from those of Grace in that they have no compartments. Vessels serving the Atlantic have the entire No. 3 hold refrigerated, whereas most of the space for the Gulf is in No. 3 'tween decks.

“The petitioner is facing a dilemma; if the existing contracts are cancelled and space allocations made, it must answer suits for breach of contract; on the other hand, if no allocations are made, complaints seeking reparations may be anticipated. In fact one such complaint was filed by Philip R. Consolo (Docket No. 827) on November 15, 1957. Inasmuch as the facts to be developed in the complaint proceeding will be pertinent to the proceeding recom-

mended herein, the parties thereto are interested in the latter proceeding, and the former will not be expanded, we recommend that both be considered on the same record.

"The report of the Board in the Grace Line case is currently being reviewed by the Court of Appeals for the Second Circuit. The decision of the Court will probably be helpful in disposing of these proceedings, nonetheless we see no reason for delaying the taking of evidence.

*"Recommendation:*

"It is recommended that the Board grant the petition of Flota Mercante Grancolombiana, S.A. for a hearing in which there will be developed a record on which the Board can determine the validity of the aforescribed contracts of this carrier.

"Further it is recommended that the hearing in the proceeding be consolidated with the hearing in the complaint proceeding in Docket No. 827, *Philip R. Consolo v. Flota Mercante Grancolombiana, S.A., and Panama Ecuador Shipping Corporation* for the receipt of evidence. An appropriate order is attached.

No Legal Objection:

(Signed) L. TIBBOTT

(Signed) E. ROBT. SEAVER  
General Counsel"

[fol. 580] The order referred to in the foregoing memorandum is as follows:

"ORDER

\* \* \* \* \*

After discussion, by the "yea" vote of Chairman Morse and Member Stakem, the recommendations contained in the above-quoted memorandum were approved, and the order as above set forth was adopted.

## Proceedings of the Federal Maritime Board

June 22, 1959.  
(Regular Meeting)

Present: Chairman Morse, Vice Chairman Guill and Member Stakem.

Also Present: G. L. Andrews, Deputy General Counsel; F. W. Gormley, of the Office of the Secretary (entered the meeting at 9:40 A.M.); James L. Pimper, Secretary; and G. A. Viehmann, Assistant Secretary.

The Board convened at 9:15 A.M. and adjourned at 10:30 A.M.

\*     \*     \*     \*     \*

The Secretary was directed to sign and transmit an appropriate letter thereon. Copy of said letter and memorandum dated June 19, 1959, from the Chief, Regulation Office are in the files of the Secretary.

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Report and order—Dockets Nos. 827, 835 and 841—Carriage of bananas from Ecuador to U. S.

The Secretary presented a draft of proposed report and order of the Board in Dockets No. 827—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.; No. 835—Flota Mercante Grancolombiana, S. A.—Carriage of Bananas from Ecuador to the United States; No. 841—Banana Distributors, Inc. v. Flota Mercante Grancolombiana, S. A., prepared in accordance with the Board's instructions following oral argument on exceptions to the recommended decision of the examiner heard by the Board on May 12, 1959.

[fol. 581] Prior to the meeting this morning copies of the proposed report and order of the Board were distributed to the members of the Board for review.

After discussion, by the "yea" vote of Chairman Morse, Vice Chairman Guill and Member Stakem, the Board adopted the following report and order, and authorized

the Secretary to issue them. Said report and order as issued read as follows:

\* \* \* \* \*

### Proceedings of the Federal Maritime Board

June 22, 1959.  
(Special Meeting)

Present: Chairman Morse, Vice Chairman Guill and Member Stakem.

Also Present: G. L. Andrews, Deputy General Counsel; M. W. Belcher, of the Office of the General Counsel; L. C. Smith, Deputy Chief, Toby Jaffe and G. M. Rice of the Office of Government Aid; S. Hotsko, Special Assistant, Government Aid; James L. Pimper, Secretary; and G. A. Viehmann, Assistant Secretary.

Appearances: Representatives of Grace Line Inc.: Burke G. Piper, E. F. Wilmerding, R. C. Alsop and E. R. Lutz.

The Board convened at 10:35 A.M. and adjourned at 12:05 P.M.

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[fol. 582] Proceedings of the Federal Maritime Board.

January 25, 1961.  
(Special Meeting)

Present: Chairman Wilson, Vice Chairman Stakem and Member Unander.

Also Present: J. Magnusson, Attorney-Adviser, Office of the Secretary; and Thomas Lisi, Secretary.

The Board convened at 11:20 A.M. and adjourned at 11:30 A.M.

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Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

The Board discussed the record in Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A., oral argument on which had been heard by the Board at 10:00 A.M. this morning.

After discussion, the Board directed the Secretary to have draft of report prepared for submission to the Board in accordance with their instructions at this meeting.

By the "yea" vote of Chairman Wilson, Vice Chairman Stakem and Member Unander, the meeting adjourned at 11:30 A.M.

A true record.

Secretary.

[fol. 583] Proceedings of the Federal Maritime Board.

February 9, 1961.  
(Regular Meeting)

Present: Chairman Wilson, Vice Chairman Stakem and Member Unander.

Also Present: J. L. Pimper, General Counsel; L. C. Hoffman, Chief, and D. E. Frye, of the Office of Ship Construction (entered the meeting at 10:45 A.M.); E. E. Metz, Chief, Office of Government Aid (entered the meeting at 10:50 A.M.); and Thomas Lisi, Secretary.

Appearances: Representatives of:

American President Lines, Ltd.: Noah M. Brinson and George T. Paine (entered the meeting at 10:55 A.M. and withdrew at 11:40 A.M.).

States Steamship Company: Walter D. Brennan, Vice President, M. B. Frochen, Secretary-Treasurer, J. W. Dickover, Vice President, Douglas C. MacMillan, of George G. Sharp Co., Naval Architects, James L. Adams and Gordon L. Poole, attorneys for States SS. Co. (all entered the meeting at 12:00 Noon and withdrew at 12:40 P.M.).

The Board convened at 9:40 A.M. and adjourned at 12:50 P.M.



Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

The Board noted that the matter of Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., transmitted by the Chief Examiner, Office of Hearing Examiners, under date of February 2, 1961, was now ready for decision by the Board.

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[fol. 584] Proceedings of the Federal Maritime Board

March 24, 1961.  
(Special Meeting)

Present: Chairman Stakem, Vice Chairman Unander and Member Wilson.

Also Present: J. L. Pimper, General Counsel; W. R. Burchill, of the Office of the General Counsel (withdrew from the meeting at 3:10 P.M.); Thomas Lisi, Secretary; and G. A. Viehmann, Assistant Secretary.

The Board convened at 2:35 P.M. and adjourned at 3:15 P.M.

NOTE: This matter disposed of by memorandum dated March 28, 1961, from the Chief, Office of Regulations, copies of which were furnished to Members of the Board, and copy of which is in the files of the Secretary.

Mr. Burchill withdrew from the meeting at 3:10 P.M.

Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.

The Board directed the General Counsel to review the proposed decision of the Federal Maritime Board in Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., and unless he observes possible legal questions involved in said decision, to return it to the Secretary for issuance.

By the "yea" vote of Chairman Stakem, Vice Chairman Unander and Member Wilson, the meeting adjourned at 3:15 P.M.

A true record.

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Assistant Secretary.

[fol. 585] Proceedings of the Federal Maritime Board.

March 27, 1961.  
(Regular Meeting)

Present: Vice Chairman Unander and Member Wilson, a quorum. Chairman Stakem absent.

Also Present: J. L. Pimper, General Counsel; Thomas Lisi, Secretary; and G. A. Viehmann, Assistant Secretary.

The Board convened at 9:30 A.M. and adjourned at 9:55 A.M.

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Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

Pursuant to instructions of the Board at the special meeting on March 24, 1961, the General Counsel reported that he had reviewed the proposed decision of the Federal Maritime Board in Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., and that there were no legal questions involved.

After discussion, by the "yea" vote of Vice Chairman Unander and Member Wilson, the Board directed the Secretary to have the proposed decision modified so as to incorporate language to the effect that, in the event full payment is not made within the sixty day period provided for, interest will begin to accrue thereafter on the unpaid amount, and resubmit to the Board after modification.

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By the "yea" vote of Vice Chairman Unander and Member Wilson, the meeting adjourned at 9:55 A.M.

A true record.

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Secretary.

[fol. 586] Proceedings of the Federal Maritime Board.  
March 28, 1961.  
(Special Meeting)

Present: Chairman Stakem, Vice Chairman Unander and Member Wilson.

Also Present: Thomas Lisi, Secretary.

The Board convened at 10:00 A.M. and adjourned at 10:15 A.M.

Report & Order—Docket Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

The Secretary presented a proposed Report and Order of the Board in Docket Nos. 827—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.; and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., which had been modified pursuant to directions of the Board at the regular meeting on March 27, 1961.

After discussion, by the "yea" vote of Chairman Stakem, Vice Chairman Unander and Member Wilson, the Board adopted the Report and Order, and directed the Secretary to sign and issue them. Said Report and Order as issued read as follows:

\* \* \* \* \*

By the "yea" vote of Chairman Stakem, Vice Chairman Unander and Member Wilson, the meeting adjourned at 10:15 A.M.

A true record.

\_\_\_\_\_  
Secretary.

[fol. 587] Proceedings of the Federal Maritime Commission.

July 3, 1962.  
(Special Meeting)

Present: Chairman Stakem, Vice Chairman Harlee and Commissioner Patterson, a quorum. Commissioners Barrett and Day absent.

Also Present: E. E. Metz, Executive Director; J. L. Pimper, General Counsel; and G. A. Viehmann, Assistant Secretary.

The Commission convened at 9:40 A.M. and adjourned at 10:00 A.M.

Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.—Proceeding reopened for reconsideration of reparations.

The Commission considered petition dated June 7, 1962, of respondent, Flota Mercante Grancolombiana, S.A., to reopen the record in Dockets Nos. 827 and 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A., for the purposes of taking evidence, for consideration of the specific issues directed by the Court, and for reconsideration of the other issues not decided by the Court; and, if further evidence is not taken, to be permitted to file further briefs and present oral argument to the Commission; and reply thereto dated June 25, 1962, by complainant, Philip R. Consolo, transmitted by the Chief Examiner, Office of Hearing Examiners under date of July 2, 1962.

After discussion, by the "yea" vote of Chairman Stakem, Vice Chairman Harllee and Commissioner Patterson, the Commission took the following actions:

1. Denied petition of respondent, Flota Mercante Grancolombiana, S.A., insofar as it requests reopening of Docket 827 (Sub. No. 1) for additional evidence.
2. Granted petition of respondent that Docket 827 (Sub. No. 1) be reopened for reconsideration of reparations upon the existing record and directed:

(a) that such reopening shall be limited to the receipt of briefs and oral argument, with any fact relied [fol. 588] upon by either party to be specifically identified by reference to the place in the record where found, and

(b) that opening briefs shall be simulanteously filed by the parties on or before the close of business on July 31, 1962, and reply briefs filed within ten days after the date of filing opening briefs,

and directed that an appropriate order on said actions be issued. Said order as issued reads as follows:

. . . . .

Memorandum dated July 2, 1962, from the Chief Examiner, Office of Hearing Examiners, relative to the above matter is in the files of the Secretary.

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Proceedings of the Federal Maritime Commission.

October 29, 1962.  
(Regular Meeting)

Present: Chairman Stakem, Vice Chairman Harlee, Commissioners Barrett, Day and Patterson.

Also Present: J. L. Pimper, General Counsel; E. E. Metz, Executive Director (withdrew from the meeting at 4:05 P.M.); J. B. Blum, of the Office of the General Counsel (entered the meeting at 4:15 P.M. and withdrew at 4:45 P.M.); J. E. Mazure, of the Office of the General Counsel (entered the meeting at 4:50 P.M.); T. Lisi, Secretary; and G. A. Viehmann, Assistant Secretary.

The Commission convened at 3:00 P.M. and adjourned at 5:25 P.M.

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Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A.

The Commission discussed the record in Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A., oral argument on which had been heard by the Commission on October 24, 1962.

After discussion, the Commission directed the General Counsel to prepare a proposed report and order in accordance with instructions given at this meeting.

[fol. 589] During the discussion of the above matter, Mr. Blum entered the meeting at 4:15 P.M. and withdrew at 4:45 P.M.

Mr. Mazure entered the meeting at 4:50 P.M.

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\* \* \* \* \*

Proceedings of the Federal Maritime Commission.

September 16, 1963.  
(Regular Meeting)

Present: Chairman Harlee, Vice Chairman Barrett, Commissioners Day and Patterson. Commissioner Stakem absent.

Also Present: J. L. Pimper, Acting Managing Director; R. E. Mitchell, Acting General Counsel; J. C. Hunt, Special Assistant to Chairman Harlee (entered the meeting at 2:35 P.M.); W. A. Stigler, Director, and L. F. Fuller, Deputy Director, Bureau of Foreign Regulation (entered the meeting at 3:20 P.M.); and T. Lisi, Secretary.

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The Commission convened at 2:00 P.M. and adjourned at 3:50 P.M.

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Report and Order—Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.

The Commission considered draft of proposed Report and Order of the Commission in Docket No. 827 (Sub. No. 1)—Philip R. Consolo v. Flota Mercante Grancolombiana, S.A., which had been prepared pursuant to instructions given by the Commission at the regular meeting on October 29, 1962, copies of which had previously been distributed to the Commissioners.

After discussion, by the "yea" vote of the Chairman Harlee, Vice Chairman Barrett, Commissioners Day, Patterson and Stakem,\* the Commission adopted the Report and Order and directed that they be served on the parties.

\* Commissioner Stakem advised the Secretary that he had reviewed the draft of Report and Order and wished to have the record reflect that he voted to adopt said Report and Order.

The Commission's Report and Order in Docket No. 827 (Sub. No. 1) as served, will be found in the formal docket of this proceeding.

[fol. 590]

## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 1

FMB Docket No. 827

FLOTA MERCANTE GRANCOLOMBIANA, S.A.  
 STATEMENT AS TO WHEN EACH OF OUR  
 VESSELS ENTERED THE BANANA TRADE  
 BETWEEN ECUADOR AND UNITED STATES  
 NORTH ATLANTIC PORTS

CIUDAD DE QUITO .....	December 26, 1949
CIUDAD DE MEDELLIN .....	July 8, 1951
CIUDAD DE MANIZALES .....	April 3, 1953
CIUDAD DE CALI .....	August 26, 1953
CIUDAD DE IBAGUE .....	November 29, 1953
CIUDAD DE TUNJA .....	July 29, 1957
MANUEL MEJIA .....	February 8, 1958
GARTAGENA DE INDIAS .....	May 17, 1958
CIUDAD DE PASTO .....	July 5, 1958
CIUDAD DE BARRANQUILLA ....	July 21, 1958

Source: Supplied by Grancolombiana

[fol. 591]

## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 15

FMB Docket No. 827

AGREEMENT entered into this 20th day of July, 1955, by and between FLOTA MERCANTE GRANCOLOMBIANA S.A., a Colombian corporation with its principal place of business in the City of Bogota, Republic of Colombia, S.A. (hereinafter called "GRANCOLOMBIANA"), acting herein through its duly authorized Agent, the North American Division of TRANSPORTADORA GRANCO-

LOMBIANA, LTDA., a Colombian limited liability company authorized to do business in the State of New York, U.S.A., having its office at 52 Wall Street, New York, New York, and Mr. LEONARD MOREY, of 383 Lafayette Street, New York, New York and SAMUEL G. STAFF, of 415 Fifth Avenue, New York, New York, (hereinafter jointly called "LESSEE").

### WITNESSETH

1. GRANCOLOMBIANA agrees to lease to LESSEE the refrigerated space existing at the present in the hold #3 of its vessels known as "CIUDAD DE MANIZALES", registered in Colombia, S.A., "CIUDAD DE QUITO", registered in Ecuador, S.A. "CIUDAD DE MEDELLIN", "CIUDAD DE CALI" and "CIUDAD DE IBAGUE" registered in Colombia, S.A., for the transportation of bananas from Guayaquil or Puerto Bolivar or Esmeraldas, Ecuador, S.A., to Philadelphia, Pennsylvania, U.S.A., on all northbound trips made by such vessels from said Ecuadorian ports, via Buenaventura, Colombia, to New York, New York, U.S.A., and LESSEE hereby hires all such refrigerated space under the terms and conditions hereinafter stipulated.

4. GRANCOLOMBIANA will give LESSEE, in his offices in Guayaquil, approximately five days advance notice of the date at which a vessel will be expected to be ready to load at Guayaquil, and thereafter shall keep LESSEE regularly informed of any change in the expected readiness of the vessel. If LESSEE desires to load at Puerto Bolivar or Esmeraldas instead of Guayaquil, LESSEE should im-[fol. 592] mediately, upon receipt of above mentioned notice, notify GRANCOLOMBIANA by cable accordingly.



## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 33

BANANA FREIGHTING AGREEMENT—  
FREIGHTER VESSELS

Banana Freighting Agreement entered into the September 30, 1957, by and between GRACE LINE INC., hereinafter called "Grace" and Philip R. Consolo hereinafter called the "Shipper".

1) This Agreement covers the transportation of bananas from Puna (Guayaquil), Ecuador, in the refrigerated space suitable for the carriage of bananas specified as

Bin S-4-B 1888 cu. ft.	Bin S-4-H 2645 cu. ft.
Bin S-4-D 4058 cu. ft.	Bin S-4-J 1607 cu. ft.
Bin S-4-C 1893 cu. ft.	Bin S-4-K 1928 cu. ft.
Bin S-4-F 1590 cu. ft.	Bin S-4-L 1607 cu. ft.
Bin S-4-G 1628 cu. ft.	
	<hr/> Total 18843 cu. ft.

in the freighter vessels of Grace operated in approximately weekly service to New York, namely the SANTA ELISA, SANTA INES, SANTA OLIVIA, SANTA RITA, SANTA CATALINA, SANTA TERESA and SANTA ANA, or suitable substitutes.

2) The presently scheduled arrival and departure day of said freighter vessels at Puna, Ecuador, Northbound, is Friday and the presently scheduled arrival day at New York is Monday. These scheduled days may be advanced or retarded by Grace three (3) days upon five (5) days prior notice to the Shipper.

3) Freight will be computed at the rate of \$36.00 U.S. Currency per ton of 2,000 pounds based on total outturn weights. Freight is considered earned, bananas loaded or not, vessel lost or not lost. For the use of the refrigerated space specified in paragraph one hereof, the Shipper guarantees to Grace a minimum payment against freight

charges in the amount of \$0.325 U.S. Currency per cubic foot of space made available to the Shipper, used or not used; such minimum freight payment totals \$6100.00.

. . . . .

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[fol. 593]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 34

CHILEAN LINE  
Compania Sub-Americana De Vapores  
29 Broadway  
New York 6, N.Y.

July 28, 1958

Mr. Philip R. Consolo  
202 Franklin Street  
New York, N. Y.

RE: Bananas Puna/Baltimore  
SS MAIPO #52 N.B.

Gentlemen:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our SS MAIPO scheduled to load Puna on or about August 17 or 18 the conditions of carriage are as follows:

Loading:	Port of Puna, Ecuador
Discharging:	Baltimore
Length of voyage maximum 11 days	

1. The shipment must be loaded within 12 hours after the ship has been declared in "Free Pratique" Saturdays, Sundays and holidays included, and in case it is not loaded within that time, the Master has the right to sail and the total freight on the available space is to be paid neverthe-

less. Should the Master decide to stay over the 12 hours, due to the fault of the cargo, the shipper must pay \$200.00 (Two Hundred Dollars) per hour for each hour waiting time.

2. In order for the vessel to call at Puna the shipper guarantees that unless notification is given 20 days in advance of the scheduled date of call of the impossibility to load the total or part of the cargo he will guarantee to pay freight on a minimum of 200 tons for the available space, whether or not used.

3. Upon arrival at destination, the cargo will be discharged at the ship's convenience, Saturdays, Sundays and holidays included, and the cargo must be received as fast as the vessel discharges. Any time lost by the vessel in discharging by fault of the receiver will be charged to the [fol. 594] cargo at the rate of \$200.00 (Two Hundred Dollars) per hour.

4. The ship assumes the responsibility of maintaining the Chambers at the temperature requested by the shippers, in writing, within two degrees, one degree over or one degree below otherwise the ship will maintain a temperature at its own discretion. At any rate, the carrier assumes no responsibility concerning the condition of the cargo on delivery.

5. The cargo is to be loaded and discharged for account of the shippers and all expenses connected therewith, such as clerking, tallying, etc., are to be absorbed by the shippers. However, you have requested and we have accepted to discharge the cargo for your account for which you will pay us a fee of \$12.50 per 2,000 pounds. Nevertheless, considering that we are performing the discharging for your account, item 3 above will remain in effect.

6. The shipper will pay freight at the rate of \$31.00 per 2000 pounds, outturn weight, free in and out, and the estimate of the freight plus discharging fee is to be paid twenty (20) days prior to loading.

We estimate you can load a minimum of 267 tons in 29434 cubic feet of available space and your check in the following amount is requested:

Freight:

534,000 #— at \$31.00 per 2000 pounds = \$ 8277.00

Discharging:

534,000 #— at \$12.50 “ “ “ = 3337.50

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\$11614.50

7. All taxes to which the freight is subject shall be for account of the shipper.

8. Our principals, Compania Sud-Americana de Vapores, in Valparaiso, will notify your shippers through our Guayaquil agents, the loading date and approximate hour of arrival 5 days in advance.

To acknowledge your agreement to the foregoing conditions, we shall appreciate your signing the duplicate copy of this letter, and returning it to us with your remittance.

[fol. 595] Accepted subject to all conditions of the stipulations, exceptions, and conditions of the dock receipt and bill of lading, whether written, printed or stamped.

Your early attention to this will be greatly appreciated.

Very truly yours,

CHILEAN LINE, INC.

Agents, C.S.A.V.

/s/ J. SLATTERY

per ALFRED A. CAMPION  
TRAFFIC MANAGER

CHILEAN LINE  
Compania Sud-Americana De Vapores  
29 Broadway  
New York 6, N.Y.

September 3, 1958

Mr. Philip R. Consolo  
202 Franklin Street  
New York, N. Y.

RE: BANANAS PUNA/BALTIMORE  
SS ACONCAGUA #54 N. B.

Dear Sir:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our SS ANCONCAGUA scheduled to load Puna on or about Sept. 16th, the conditions of carriage are as follows:

\* \* \* \* \*

[fol. 596]

CHILEAN LINE  
Compania Sud-Americana De Vapores  
29 Broadway  
New York 6, N.Y.

September 3, 1958

Mr. Philip R. Consolo  
202 Franklin Street  
New York, N. Y.

RE: BANANAS PUNA/BALTIMORE  
SS IMPERIAL #50 N.B.

Dear Sir:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our SS IMPERIAL scheduled to load Puna on or about Sept. 30th, the conditions of carriage are as follows:

\* \* \* \* \*

CHILEAN LINE  
Compania Sud-Americana De Vapores  
29 Broadway  
New York 6, N.Y.

September 24, 1958

Mr. Philip R. Consolo  
202 Franklin Street  
New York 5, N. Y.

RE: BANANAS PUNA/BALTIMORE  
S/S COPIAPO #52

Dear Sir:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our S/S COPIAPO scheduled to load Puna on or about October 30th, the conditions of carriage are as follows:

. . . . .

[fol. 597]

CHILEAN LINE  
Compania Sud-Americana De Vapores  
29 Broadway  
New York 6, N.Y.

September 24, 1958

Mr. Philip R. Consolo  
202 Franklin Street  
New York 5, N.Y.

RE: BANANAS PUNA/BALTIMORE  
S/S MAIPO #53

Dear Sir:

Further to our conversation confirming booking of entire refrigerator space consisting of four chambers approximately 29,434 cu. ft. on our S/S MAIPO scheduled to load Puna on or about October 13th, the conditions of carriage are as follows:

. . . . .

## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 36

MEMORANDUM OF AGREEMENT entered into the Fifteenth day of July, 1953 at New York, New York by and between GRACE LINE INC. and Philip R. Consolo hereinafter referred to as "the Shipper", upon the following terms and conditions:

1. This agreement covers the use for the transportation of bananas between Puna or Puerto Bolivar, Ecuador and New York, N. Y. of the refrigerated space suitable for the carriage of bananas in the entire Lower Tween Deck of Hatch No. 4 in the freighter vessels of the Grace Line sailing approximately every two weeks between Puna or Puerto Bolivar, Ecuador and New York.

2. The freighter vessels presently operated in this service are the S/S SANTA INES, S/S SANTA OLIVIA, and S/S SANTA RITA. This contract covers any suitable vessel with refrigerated space which may be substituted for any of the above vessels.

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[fol. 602]

## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 37

MEMORANDUM OF AGREEMENT entered into the Fifteenth day of July, 1953 at New York, New York by and between GRACE LINE, INC. and Philip R. Consolo, hereinafter referred to as "the Shipper," upon the following terms and conditions:

1. This agreement covers the use for the transportation of bananas between Puna, or Puerto Bolivar, Ecuador and New York, N.Y. of the refrigerated space suitable for the carriage of bananas in the entire Lower Tween Deck of Hatch No. 3 in the regular weekly passenger vessels of

the Grace Line in service between Puna, or Puerto Bolivar, Ecuador and New York.

2. The passenger vessels presently operated in this weekly service are the S/S SANTA BARBARA, S/S SANTA CECILIA, S/S SANTA ISABEL, S/S SANTA LUISA, S/S SANTA MARGARITA and S/S SANTA MARIA. This contract covers any suitable vessel with refrigerated space which may be substituted for any of the above vessels.

3. The presently scheduled arrival and departure day at Puna, or Puerto Bolivar, Ecuador northbound is Friday, and the presently scheduled arrival day at New York is Monday, but these scheduled days may be advanced or retarded twenty-four (24) hours upon prior notice to the shipper. This will only be done when necessary.

4. Grace Line Inc. shall have the option of placing vessel on berth to load at either Puna or Puerto Bolivar, Ecuador. Grace Line Inc. shall advise the Shipper at which port vessel will load four (4) days prior to arrival. At Ecuadorian loading port it is agreed that the bananas will be loaded by the Shipper, or his agents, free of expense to the vessel, and such loading operations must be completed within the scheduled stay of the vessel at Ecuadorian loading port, presently calculated to be a maximum of twelve (12) hours to be counted from the time vessel receives pratique on arrival. Ships may sail at conclusion of lay-time irrespective of amount of bananas loaded. Ships will furnish power and winches whenever required, also lights for night work.

[fol. 603] 5. Grace Line Inc. undertakes that it will exercise due diligence to make vessels tendered for carrying fruit under this agreement tight, staunch and strong and in all respects seaworthy and properly manned, equipped and supplied, and to make the refrigerated space in which the bananas are carried fit and safe for its reception, carriage and preservation. Grace Line will follow the instructions of the Shipper or his agents with respect to the pre-



cooling of the compartment and refrigeration of the bananas, subject to the directions of the Master of each vessel in so far as the vessel's safety is concerned. The Shipper, or his agents agrees to furnish the ship in writing prior to the departure from Puna, Ecuador instructions as to the temperature at which this refrigerator chamber is to be maintained with a range for the delivery air within 5 degrees Fahrenheit. In the event that these instructions are not delivered by the Shipper or his agents, the Grace Line will exercise due judgment, maintaining proper refrigeration based on experience.

6. Grace Line shall whenever possible notify the Shipper or his agents in Guayaquil, Ecuador and New York respectively forty-eight (48) hours and again twenty-four (24) hours in advance of the expected hour of arrival of each vessel at each of said ports.

7. At New York bananas are to be discharged at a terminal designated by Grace Line Inc. to dock and/or lighters. Trucks and lighters are to be furnished by the Shipper or his agents and shall be made available to the vessel immediately upon arrival, and delivery shall be taken as fast as can be effected by the vessel. The actual discharge from the vessel and stowing in lighters as well as discharge to the dock shall be performed by the stevedores designated by the Grace Line at actual cost for account and cargo risk of the Shipper unless some other basis is mutually agreed.

8. The Shipper guarantees the use of the compartment for bananas as hereinbefore specified during the entire year. The Shipper shall pay Grace Line Inc, for the transportation of bananas hereunder at the rate of Twenty-Nine Dollars (\$29.00) U.S. Currency per ton of 2,000 pounds based on total outturn weights. Freight charges are due [fol. 604] and payable in New York City, New York upon cable advice that vessel has reported for loading, fruit loaded or not loaded, vessel lost or not lost. Proper outturn weight certificates are to be furnished to the Grace Line Inc. in New York within one week after discharge of each vessel.

9. The Shipper guarantees Grace Line Inc. a minimum payment of freight charges of Four Thousand Seven Hundred and Fifty Dollars (\$4,750.00) U.S. Currency per vessel for the transportation of bananas hereunder.

10. Grace Line usual form of bill of lading shall be issued for all bananas transported hereunder without prejudice to this agreement, and where terms of the bill of lading are in conflict with the terms of this agreement, the terms of this agreement shall prevail.

11. Neither party shall be responsible for any default or delay in the performance of its obligation hereunder due to strikes, acts of God, of the public enemy, war declared or undeclared, including the act of any belligerent therein, riot, rebellion, revolution, blockade, embargo, quarantine, collision, perils of the sea or requirement, regulation, restriction or other act of any legally established government or revolutionary government.

12. It is mutually agreed that this contract may be cancelled by the Grace Line upon one hundred and twenty (120) days written notice to the Shipper, or as may be required by the United States Government or any agency thereof. If an order of the Federal Maritime Board shall be entered pursuant to its report of June 23, 1953, this contract shall terminate on the date such order becomes final either by virtue of Grace Line's failure to appeal from it within the time limited by law, or by virtue of its final affirmance in any court of competent jurisdiction.

13. It is further understood that if after one year from the effective date of this contract the Shipper is prevented from meeting minimum freight charges solely because of the Sigatoka disease, this agreement may be cancelled by the Shipper upon ninety (90) days written notice to the Grace Line Inc.

[fol. 605] 14. The Shipper hereby agrees to deposit in any bank designated by the Grace Line the sum of Fifty Thousand Dollars (\$50,000) U.S. Currency, in cash or in securities acceptable to the Grace Line, as a guarantee of

prompt payment of freight charges due and as a bond for fulfillment of the terms and conditions of this contract. This deposit shall be held in the name of the Grace Line and shall be returned to the Shipper not later than thirty (30) days after expiration of this contract or any termination thereof as specified herein.

15. This agreement shall become effective with the loading of the first vessel made available to the Shipper in accordance with this contract, after September 1, 1953, and shall remain in effect for two (2) years from that date thereafter.

16. The terms and provisions of this agreement shall extend to and include the subsidiary companies of the parties wherever applicable.

17. This agreement may be further extended by mutual consent of both parties.

GRACE LINE INC.

By

/s/ J. E. MAGNER,  
Senior Vice-President

ACCEPTED:

By

/s/ PHILIP R. CONSOLO

March 24, 1955

Mr. Philip R. Consolo  
Atlantic Fruit & Steamship Co., Inc.  
30 Vesey Street  
New York, N. Y.

Dear Mr. Consolo:

Kindly refer to the Agreement entered into between us on the 15th day of July, 1953, for the transportation of bananas from Ecuador to New York on the Santa passenger vessels presently employed by Grace Line in that trade.

In accordance with your request and as provided in Article 17 thereof, we hereby agree that said Agreement is further extended on the same terms and conditions until approximately June 30, 1957.

Yours very truly,

GRACE LINE INC.

/s/ James E. Magner  
Senior Vice President

Accepted.

/s/ Philip R. Consolo

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[fol. 607]

GRACE LINE  
Hanover Square  
New York 4, N. Y.

July 20, 1955

Mr. Philip R. Consolo  
c/o Atlantic Fruit & Steamship Co.  
30 Vesey Street  
New York 7, New York

Dear Mr. Consolo:

This will refer to our recent discussions concerning the necessity of a moderate upward adjustment in the rate on bananas.

As explained to you, this upward adjustment is necessary in view of increased operating costs occurring over the last two years. Such increased costs are not confined to our service in particular, but are general in all trades. You will recall our showing you photographic copies of press clippings concerning rate increases placed in effect early this year by carriers operating world-wide services. Therefore, as agreed between us, effective September 1, 1955, with all sailings from Ecuador the freight rate on bananas will be \$31.00 U.S. Currency per ton of 2,000 pounds based on outturn weights.

We believe this warranted increase is reasonable, and we sincerely appreciate your understanding and willingness to cooperate in this matter.

This letter is submitted in triplicate, and we would ask you to sign and return two copies at your earliest convenience.

Very truly yours,  
GRACE LINE INC.

James E. Magner  
Senior Vice President

In Triplicate

Accepted:

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Philip R. Consolo

[fol. 608]

## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 41

## CONSOLIDA BANANA PURCHASE AND SALE EXPERIENCE

FMB Docket 827  
Exhibit 41  
Page 4 of 6

(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Consolid Stems Shipped	(6) Cost in Sueros	(7) Free Market Exchange Rate	(8) Cost in Dollars 1/	(9) Stems Out-Turn Count	(10) Out-Turn Weight (Pounds)	(11) Gross Sales (Dollars)	(12) Net Sales (Dollars)	(13) Profit Be- fore Stev. & Freight	(14) Profit per Stem Sold Before Stev. & Freight
237	Santa Isabel	2/11/57	2/25/57 2/	3576	109,333.03	18.84	\$6,896.54	3645	309,650	\$21,162.38	\$19,186.73	\$12,290.19	\$3.572
238	Santa Cecilia	2/23/57	3/4/57 2/	4360	132,505.01	18.84	8,366.17	4522	380,780	20,275.57	18,765.79	10,399.62	2.300
239	Santa Ines	2/25/57	3/7/57 2/	5237	159,126.79	18.84	10,047.34	5431	440,290	17,574.62	16,095.25	6,045.91	1.113
240	Santa Maria	3/2/57	3/11/57 2/	4150	129,726.21	18.08	8,235.58	4407	364,000	20,366.68	19,042.55	10,806.97	2.452
241	Santa Margarita	3/8/57	3/18/57 2/	4290	134,856.30	18.08	8,555.09	4339	386,350	24,472.35	22,898.83	14,343.74	3.346
242	Santa Olivia	3/10/57	3/20/57	6115	177,711.17	18.08	11,391.73	5998	494,495	30,550.27	28,983.43	17,591.70	2.933
243	Santa Barbara	3/24/57	4/2/57	4457	131,359.24	18.08	8,404.35	4407	377,940	19,313.78	18,072.40	9,668.05	2.194
244	Santa Isabel	3/28/57	4/7/57	4150	121,952.43	18.08	7,805.61	4114	359,190	20,280.10	18,764.36	10,958.75	2.644
245	Santa Rita	4/2/57	4/12/57	5590	163,853.17	17.70	10,536.31	5480	473,090	25,916.33	24,557.94	14,021.63	2.559
246	Santa Cecilia	4/5/57	4/15/57	4274	124,708.73	17.70	8,423.64	4168	357,400	22,280.35	20,916.25	12,892.61	3.093
247	Santa Elisa	4/8/57	4/18/57	4773	138,785.45	17.70	8,233.11	4694	402,550	20,072.45	18,920.45	9,987.34	2.188
248	Santa Maria	4/13/57	4/23/57	3707	108,889.79	17.70	7,000.18	3607	307,170	17,988.45	16,490.34	9,490.16	2.631
249	Santa Ines	4/16/57	4/26/57	4464	132,220.08	17.70	8,491.48	4363	358,670	19,063.95	18,048.67	9,557.19	2.191
250	Santa Margarita	4/19/57	4/29/57	4501	131,722.13	17.70	8,471.82	4432	376,260	21,121.82	19,576.43	11,104.61	2.506
251	Santa Barbara	4/30/57	5/9/57	4233	124,473.37	17.70	8,000.95	4132	362,860	23,013.29	21,337.65	13,336.70	3.228
252	Santa Luisa	5/3/57	5/13/57	4000	118,749.18	17.80	7,615.12	3841	342,140	20,660.14	19,182.81	11,567.69	3.012
253	Santa Olivia	5/6/57	5/16/57 2/	5000	146,543.74	17.80	9,412.57	4973	416,535	24,381.09	22,518.00	13,105.43	2.635
254	Santa Isabel	5/11/57	5/21/57	4360	128,356.72	17.80	8,239.82	4219	372,420	22,198.75	20,643.30	12,403.48	2.940
255	Santa Cecilia	5/18/57	5/28/57	4040	117,829.36	17.80	7,572.89	3983	337,780	22,536.13	20,988.29	13,415.40	3.368
256	Santa Rita	5/21/57	5/30/57	5120	147,282.82	17.80	9,482.41	5031	418,350	30,482.31	28,489.30	19,006.89	3.778
257	Santa Maria	5/25/57	6/4/57	4030	113,219.45	17.80	7,311.54	3939	322,000	27,881.90	26,033.33	18,721.79	4.753
258	Santa Margarita	5/31/57	6/10/57	4245	123,679.94	17.80	7,949.94	4138	345,610	32,190.15	30,408.23	22,458.29	5.427
259	Santa Elisa	6/8/57	6/17/57 2/	6115	178,867.24	17.56	11,523.28	5982	472,635	39,448.34	37,644.93	26,121.65	4.367
260	Santa Barbara	6/9/57	6/18/57	4196	122,293.25	17.56	7,881.88	4089	349,000	29,994.01	28,311.35	20,429.47	4.996
261	Santa Luisa	6/15/57	6/25/57	4285	124,646.83	17.56	8,035.38	4180	347,700	28,542.08	26,923.72	18,888.34	4.519
262	Santa Isabel	6/21/57	7/1/57	4529	132,718.78	17.56	8,548.41	4402	364,610	24,656.02	22,726.52	14,178.11	3.221
263	Santa Ines	6/22/57	7/2/57	4209	123,299.17	17.56	7,942.01	4136	328,600	21,398.27	20,107.87	12,165.86	2.941
264	Santa Cecilia	6/28/57	7/9/57	4766	144,846.99	17.56	9,230.91	4601	364,710	23,899.90	22,266.11	12,975.20	2.820
265	Santa Maria	7/7/57	7/17/57	4866	147,429.54	17.34	9,487.27	4744	365,810	26,584.85	25,249.25	15,761.98	3.323
266	Santa Olivia	7/11/57	7/22/57	5630	170,182.37	17.34	10,954.08	5445	445,335	27,670.77	26,130.75	15,176.67	2.787

Notes: 1/ Free Market Rate applied to costs in excess of 22.50 Sueros per stem; Official rate (15.00 Sueros Per Dollar) Applied to First 22.50 Sueros Per Stem.

Notes: 2/ Lower count for Exchange computation.



[fol. 609]

## CONSOLO BANANA PURCHASE AND SALE EXPERIENCE

FMS Booklet 027  
Exhibit 4/  
Page 5 of 6

(1) Shipment No.	(2) Ship Name	(3) Date Sailed Guayaquil	(4) Date Arrived New York	(5) Consolo Stems Shipped	(6) Cost in Sueros	(7) Free Market Exchange Rate	(8) Cost in Dollars 1/	(9) Stems Out-Turn Count	(10) Out-Turn Weight (Pounds)	(11) Gross Sales (Dollars)	(12) Net Sales (Dollars)	(13) Profit Be- fore Stev. & Freight	(14) Profit per Stem Sold Before Stev. & Freight
267	Santa Margarita	7/14/57	7/24/57	4424	135,234.31	17.34	\$ 8,694.50	4345	329,430	\$23,665.07	\$21,702.29	\$13,007.79	\$2.954
1	Santa Barbara	7/19/57	7/30/57	4112	125,385.82	17.34	8,069.45	4056	296,390	20,982.50	19,934.00	11,864.55	2.925
2	Santa Rita	7/26/57	8/6/57	4885	151,987.04	17.34	9,749.92	4797	366,985	26,012.54	26,867.47	17,117.56	3.568
3	Santa Luisa	7/27/57	8/5/57	4186	128,540.28	17.34	8,260.27	3999	308,670	22,363.42	21,360.20	13,099.99	3.276
4	Santa Isabel	8/2/57	8/12/57	4833	145,498.17	17.20	9,386.46	4794	354,440	27,807.62	26,413.10	17,086.64	3.592
5	Santa Cecelia	8/10/57	8/20/57	4814	145,734.15	17.20	9,396.53	4658	362,030	26,582.75	25,271.06	15,874.53	3.408
6	Santa Elisa	8/12/57	8/21/57	6750	204,859.08	17.20	13,205.47	6669	490,710	34,165.20	32,423.23	19,217.76	2.882
7	Santa Maria	8/17/57	8/27/57	4840	152,742.32	17.20	9,008.97	4751	370,130	25,166.80	23,553.26	13,744.29	2.899
8	Santa Ines	8/20/57	8/29/57	5965	180,410.49	17.20	11,633.43	5835	444,665	22,642.52	21,866.05	10,232.62	1.754
9	Santa Margarita	8/24/57	9/3/57	4317	131,740.86	17.20	8,487.61	4170	320,870	18,144.32	15,867.92	7,380.31	1.770
10	Santa Barbara	8/31/57	9/10/57	4710	144,882.61	17.20	9,327.07	4533	355,750	21,763.00	20,369.47	11,042.40	2.436
11	Santa Olivia	9/6/57	9/16/57	5346	162,670.89	17.24	10,477.58	5278	392,780	26,144.84	24,325.13	13,847.55	2.644
12	Santa Luisa	9/7/57	9/17/57	3851	118,237.13	17.24	7,608.05	3741	285,650	19,898.09	18,982.77	11,373.92	3.040
13	Santa Isabel	9/14/57	9/24/57	4744	142,866.58	17.24	9,211.51	4655	346,380	24,422.55	22,988.67	13,777.16	2.960
14	Santa Rita	9/20/57	9/30/57	4486	137,944.21	17.24	8,875.71	4299	303,720	20,977.16	19,711.57	10,895.86	2.921
15	Santa Cecelia	9/21/57	10/1/57	5036	153,128.42	17.24	9,863.65	4819	358,010	27,618.15	26,211.83	16,348.18	3.392
16	Santa Maria	9/27/57	10/9/57	4892	150,761.66	17.24	9,698.31	4829	352,240	28,644.15	27,322.07	17,623.76	3.650
17	Santa Elisa	10/4/57	10/14/57	5810	176,397.92	17.15	11,378.11	5701	392,450	29,832.88	28,574.40	17,196.29	3.016
18	Santa Margarita	10/5/57	10/15/57	4752	143,845.59	17.15	9,281.10	4693	334,230	24,810.55	23,509.89	14,228.79	3.032
19	Santa Ines	10/11/57	10/21/57	6132	187,589.12	17.15	12,091.24	6109	422,580	32,144.58	29,644.03	17,572.79	2.877
20	Santa Olivia	10/26/57	11/4/57	5405	168,005.52	17.15	10,812.63	5348	376,155	24,109.92	22,427.71	11,615.08	2.172
21	Santa Catalina	11/2/57	11/11/57	6520	203,679.33	16.90	13,151.56	6496	431,230	22,041.47	20,525.27	7,373.71	1.135
22	Santa Rita	11/12/57	11/21/57	5700	179,141.57	16.90	11,561.34	5551	391,095	22,337.96	21,058.94	9,497.60	1.711
23	Santa Teresa	11/16/57	11/25/57	5764	188,265.67	16.90	12,112.02	5602	392,350	19,049.50	17,710.95	5,598.99	.999
24	Santa Elisa	11/23/57	12/3/57	6280	202,448.44	16.90	13,038.25	6254	444,735	19,444.74	18,397.80	5,359.55	.857
25	Santa Ines	11/28/57	12/9/57	6466	214,320.42	16.90	13,772.10	6334	443,440	15,163.35	14,204.43	432.33	.068
26	Santa Ana	12/7/57	12/16/57	5407	179,561.40	16.57	11,605.00	5348	396,980	14,231.75	13,571.51	1,966.51	.368
27	Santa Olivia	12/14/57	12/23/57	5530	179,923.02	16.57	11,644.31	5409	408,165	20,775.29	19,703.31	8,059.00	1.490
28	Santa Catalina	12/21/57	12/30/57	4023	130,075.60	16.57	8,421.83	3980	307,670	16,977.98	15,826.91	7,405.08	1.861
29	Santa Rita	12/30/57	1/9/58	5526	176,955.74	16.57	11,464.66	5416	431,335	25,711.68	24,683.34	13,218.68	2.441

Notes: 1/ Free Market Rate applied to costs in excess of 22.50 Sueros per stem; Official rate (15.00 Sueros Per Dollar) Applied to First 22.50 Sueros Per Stem.

[fol. 610]

BEFORE THE FEDERAL MARITIME BOARD

EXHIBIT No. 42

## COMPUTATION OF DAMAGES FOR EACH GRANCOLUMBIANA SAILING

FMB Docket 827  
Exhibit 42  
Page 3 of 5

I n d e x	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Voy. No.	Ship Name	Date Sailed Guayaquil 1/	Date Arrived Philadel- phia	No. of Stems Aboard	Freight paid (Dollars)	Sailing Guay. Nearest Console Ship	Console Profit/Stem Before Stev. and Freight	Total Profit Before Stev. & Freight (5) x (8)	Total Stev. at 35¢/Stem (St. Phila.) (5) x 35¢	Total Stev. at 48.8¢/Stem (N.Y.) (5) x 48.8¢	Net Profit at 35¢ Stev. (9)-(6)-(10)	1/3 Profit at 35¢ Stev. (12) ÷ 3	Net Profit at 48.8¢ Stev. (9)-(6)-(11)	1/3 Profit at 48.8¢ Stev. (14) ÷ 3
65	74-N	Quito	2/17/57	2/27/57	8,155	\$10,000.00	2/11/57	\$3,372	\$ 27,498.66	\$ 2,854.25	\$ 3,979.64	\$ 14,644.41	\$ 4,881.47	\$13,519.02	\$ 4,506.34
66	35-N	Cali	2/24/57	3/6/57	11,732	11,732.00	2/23/57	2,300	26,983.60	4,106.20	5,725.22	11,145.40	3,715.13	9,526.38	3,175.46
67	80-N	Manisales	3/2/57	3/12/57	5,700	7,000.00	3/2/57	2,452	13,976.40	1,995.00	2,781.60	4,981.40	1,660.46	4,154.80	1,384.93
68	61-N	Medellin	3/19/57	3/29/57	10,251	10,251.00	3/24/57	2,194	22,490.69	3,587.85	5,002.49	8,651.84	2,883.94	7,237.20	2,412.40
69	36-N	Ibagua	3/28/57	4/7/57	12,543	14,500.00	3/28/57	2,664	33,444.55	4,390.05	6,120.98	14,524.50	4,841.50	12,799.57	4,266.52
70	75-N	Quito	4/4/57	4/15/57	8,364	10,000.00	4/5/57	3,093	25,869.85	2,927.40	4,081.63	12,942.45	4,314.15	11,708.22	3,902.74
71	36-N	Cali	4/11/57	4/21/57	11,903	11,903.00	4/13/57	2,631	31,316.79	4,166.05	5,808.66	15,247.74	5,082.58	13,605.13	4,535.04
72	89-N	Manisales	4/22/57	5/1/57	5,041	7,000.00	4/19/57	2,506	12,632.75	1,744.35	2,460.01	3,668.40	1,222.80	3,172.74	1,057.58
73	60-N	Medellin	4/26/57	5/6/57	10,693	13,000.00	4/30/57	3,228	34,517.00	3,742.55	5,218.18	17,774.45	5,924.81	16,258.82	5,419.61
74	37-N	Ibagua	5/1/57	5/11/57	12,035	14,500.00	4/30/57	3,228	38,848.98	4,212.25	5,873.08	20,136.73	6,712.24	18,475.90	6,158.63
75	76-N	Quito	5/9/57	5/19/57	8,782	10,000.00	5/11/57	2,940	29,819.08	3,073.70	4,205.62	12,745.38	4,248.46	11,533.46	3,844.48
76	37-N	Cali	5/16/57	5/27/57	10,382	14,500.00	5/18/57	3,368	34,966.58	3,633.70	5,066.42	16,832.88	5,610.96	15,400.16	5,133.38
77	90-N	Manisales	5/22/57	6/2/57	5,749	7,000.00	5/21/57	3,778	21,719.72	2,012.15	2,805.51	12,707.57	4,235.85	11,914.21	3,971.40
78	63-N	Medellin	5/31/57	6/12/57	11,547	13,000.00	5/31/57	5,127	62,665.57	4,041.45	5,634.94	15,624.12	5,208.04	14,090.63	4,696.87
79	38-N	Ibagua	6/6/57	6/16/57	13,022	14,500.00	6/8/57	4,367	56,867.07	4,557.70	6,354.74	37,809.37	12,603.12	36,012.33	12,004.11
80	77-N	Quito	6/14/57	6/25/57	8,286	10,000.00	6/15/57	4,519	37,444.43	2,900.10	4,043.57	24,544.33	8,181.44	23,400.86	7,800.28
81	38-N	Cali	6/17/57	6/29/57	13,770	14,500.00	6/15/57	4,519	62,226.63	4,819.50	6,719.76	12,907.13	4,302.37	11,006.87	3,668.95
82	91-N	Manisales	6/24/57	7/6/57	6,174	7,000.00	6/22/57	2,941	18,157.73	2,160.90	3,012.91	8,956.83	2,988.94	8,144.82	2,714.94
83	64-N	Medellin	7/5/57	7/17/57	11,278	13,000.00	7/7/57	3,323	37,476.79	3,947.30	5,503.66	20,529.49	6,843.16	18,973.13	6,324.37
84	39-N	Ibagua	7/10/57	7/20/57	13,440	14,500.00	7/11/57	2,787	37,457.28	4,704.00	6,558.72	18,253.28	6,084.42	16,398.56	5,466.18
85	78-N	Quito	7/17/57	7/28/57	9,222	10,000.00	7/19/57	2,925	26,974.35	3,227.70	4,500.34	13,746.65	4,582.21	12,474.01	4,158.00
86	39-N	Cali	7/19/57	8/3/57	11,600	13,105.00	7/19/57	2,925	33,990.00	4,060.00	5,660.80	16,765.00	5,588.33	15,164.20	5,054.73
87	3-N	Tunja	7/31/57	8/12/57	13,059	15,950.00	8/2/57	3,552	46,385.57	4,570.65	6,372.79	25,864.92	8,621.64	24,062.78	8,020.92
88	92-N	Manisales	8/6/57	8/18/57	6,287	7,700.00	8/10/57	3,408	21,426.10	2,200.45	3,068.06	11,525.65	3,841.88	10,658.04	3,552.68
89	40-N	Ibagua	8/13/57	8/24/57	13,387	15,950.00	8/12/57	2,382	38,581.33	4,685.45	6,532.86	17,945.88	5,981.96	16,098.47	5,366.15
90	79-N	Quito 2/	8/22/57	9/4/57	8,735	11,000.00	8/20/57	1,754	15,321.19	3,057.25	4,268.68	1,263.94	421.31	58.51	19.50
91	40-N	Cali	8/27/57	9/8/57	13,364	15,950.00	8/24/57	1,770	23,548.08	4,656.40	6,492.35	2,941.68	980.56	1,105.73	368.57
92	4-N	Tunja	9/6/57	9/16/57	14,368	15,950.00	9/6/57	2,624	37,701.63	5,028.80	7,011.58	16,722.83	5,574.27	14,740.05	4,913.35
93	93-N	Manisales	9/8/57	9/21/57	5,827	7,700.00	9/7/57	3,040	17,714.08	2,039.15	2,843.58	7,974.63	2,658.21	7,170.50	2,390.16
94	41-N	Ibagua	9/17/57	9/28/57	12,776	15,950.00	9/14/57	2,550	37,816.96	4,471.60	6,234.69	17,395.36	5,798.45	15,632.27	5,210.75
95	80-N	Quito	9/25/57	10/7/57	9,241	11,000.00	9/27/57	3,050	33,729.65	3,234.35	4,509.61	19,495.30	6,498.43	18,220.04	6,073.34
96	41-N	Cali	10/5/57	10/12/57	11,714	13,247.50	10/4/57	3,016	35,329.12	4,099.90	5,716.13	17,982.02	5,994.00	16,365.49	5,455.16

Notes: 1/ When vessel shifted to Puerto Bolivar and no Guayaquil sailing date appeared in Grancolumbianna records, Puerto Bolivar date is shown.  
2/ Baltimore arrival, no Philadelphia call.



[fol. 611]

## COMPUTATION OF DAMAGES FOR EACH GRANCOLUMBIANA SAILING

FMS Docket 827  
Exhibit 12  
Page 4 of 5

I n d e x	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Voy. No.	Ship Name	Date Sailed Guayaquil 1/	Date Arrived Phila- delphia	No. of Stems Aboard	Freight paid (Dollars)	Sailing Guay. Nearest Consolo Ship	Consolo Profit/Stem Before Stev. and Freight	Total Profit Before Stev. & Freight (5 x (8))	Total Stev. at 35¢/Stem (Est. Phila.) (5) x 35¢	Total Stev. at 48.8¢/Stem (N.Y.) (5) x 48.8¢	Net Profit at 35¢ Stev. (9)-(6)-(10)	1/3 Profit at 35¢ Stev. (12)÷3	Net Profit at 48.8¢ Stev. (9)-(6)-(11)	1/3 Profit at 48.8¢ Stev. (14) ÷ 3
97	5-W	Tunja	10/8/57	10/18/57	15,395	\$15,950.00	10/5/57	\$3.032	\$46,677.64	\$5,388.25	\$7,512.76	\$25,339.39	\$8,446.16	\$23,214.88	\$7,738.29
98	4-W	Manisales	10/17/57	10/28/57	6,159	7,700.00	10/11/57	2.877	17,719.44	2,155.65	3,005.59	7,863.79	2,621.26	7,013.85	2,337.95
99	42-W	Ibague	10/23/57	11/4/57	12,848	15,950.00	10/26/57	2.172	27,905.86	4,496.80	6,269.82	7,459.06	2,486.35	5,686.04	1,895.34
100	81-W	Quito	10/29/57	11/8/57	9,495	11,000.00	10/26/57	2.172	20,623.14	3,323.25	4,633.56	6,299.89	2,099.96	4,989.58	1,663.19
101	42-W	Cali	11/6/57	11/17/57	11,240	12,655.00	11/2/57	1.135	12,757.40	3,994.00	5,495.12	(3,831.60)	(1,277.20)	(5,382.72)	(1,794.24)
102	6-W	Tunja	11/12/57	11/22/57	9,480	10,455.00	11/12/57	1.711	16,220.29	3,318.00	4,626.24	2,447.28	815.76	1,139.04	379.68
103	67-W	Medellin	11/18/57	11/28/57	6,776	8,800.00	11/16/57	.999	6,769.22	2,371.60	3,306.69	(4,402.38)	(1,467.46)	(5,337.47)	(1,779.15)
104	43-W	Ibague	11/23/57	12/6/57	13,084	15,950.00	11/23/57	.857	11,212.99	4,579.40	6,384.99	(9,316.41)	(3,105.47)	(11,122.00)	(3,707.33)
105	82-W	Quito	12/9/57	12/17/57	7,880	8,845.00	12/7/57	.368	2,899.84	2,758.00	3,845.44	(8,703.16)	(2,901.05)	(9,790.60)	(3,263.53)
106	7-W	Tunja	12/15/57	12/24/57	8,232	10,230.00	12/14/57	1.490	12,265.68	2,881.20	4,017.22	(845.52)	(281.04)	(1,981.54)	(660.51)
107	68-W	Medellin	12/23/57	1/3/58	9,050	10,112.50	12/21/57	1.861	16,842.05	3,167.50	4,416.40	3,562.05	1,187.35	2,313.15	771.05
108	44-W	Ibague	1/1/58	1/11/58	12,239	15,950.00	12/30/57	2.441	29,875.40	4,283.65	5,972.63	9,641.75	3,213.58	7,992.77	2,650.92
109	83-W	Quito	1/12/58	1/23/58	8,110	11,000.00	1/13/58	3.318	26,908.98	2,838.50	3,957.68	13,070.48	4,356.82	11,951.30	3,983.76
110	44-W	Cali	1/17/58	1/28/58	11,785	15,950.00	1/20/58	3.135	36,945.98	4,124.75	5,751.08	16,871.23	5,623.74	15,244.90	5,081.63
111	8-W	Tunja	1/24/58	2/3/58	12,903	15,950.00	1/27/58	2.410	31,096.23	4,516.05	6,296.66	10,630.18	3,543.39	8,849.57	2,949.85
112	69-W	Medellin	2/2/58	2/14/58	11,072	14,300.00	2/2/58	1.870	20,704.64	3,875.20	5,403.14	2,529.44	843.14	1,001.50	333.83
113	45-W	Ibague	2/8/58	2/20/58	10,014	11,122.50	2/7/58	1.117	11,185.64	3,504.90	4,896.83	(3,441.76)	(1,147.25)	(4,823.69)	(1,607.89)
114	4-W	N. Mejia	2/16/58	2/25/58	9,767	10,813.75	2/17/58	1.452	14,181.68	3,418.45	4,766.30	(50.52)	(16.04)	(1,398.37)	(466.12)
115	84-W	Quito	2/24/58	3/7/58	8,276	11,000.00	2/17/58	1.452	12,016.75	2,896.60	4,038.69	(1,879.85)	(626.61)	(3,021.54)	(1,007.51)
116	45-W	Cali	3/4/58	3/14/58	12,373	15,950.00	3/3/58	2.304	28,507.39	4,330.55	6,036.02	8,226.04	2,742.28	6,519.37	2,173.12
117	9-W	Tunja	3/11/58	3/21/58	11,333	12,771.25	3/9/58	1.937	21,952.02	3,966.55	5,530.50	5,214.22	1,738.07	3,690.27	1,216.75
118	70-W	Medellin	3/18/58	3/29/58	8,666	9,632.50	3/20/58	1.340	11,612.44	3,033.10	4,229.01	(1,053.16)	(351.05)	(2,249.07)	(749.69)
119	46-W	Ibague	3/25/58	4/4/58	12,776	16,109.50	3/29/58	.880	11,242.98	4,471.60	6,234.69	(9,338.22)	(3,112.74)	(11,101.31)	(3,700.43)
120	5-W	N. Mejia	4/2/58	4/13/58	7,000	9,389.21	3/29/58	.880	6,160.00	2,450.00	3,416.00	(5,679.21)	(1,895.07)	(6,645.21)	(2,215.07)
121	85-W	Quito	4/15/58	4/17/58	6,751	8,396.89	3/29/58	.880	5,940.08	2,362.85	3,294.49	(4,818.06)	(1,606.28)	(5,750.50)	(1,916.83)
122	46-W	Cali 2/	5/2/58	5/12/58	6,383	8,144.39	4/22/58	2.765	17,649.00	2,234.05	3,114.90	7,270.56	2,423.52	6,389.71	2,129.90
123	10-W	Tunja	4/24/58	5/3/58	6,137	8,080.00	4/22/58	2.765	16,968.81	2,147.95	2,994.86	6,740.86	2,246.95	5,895.95	1,964.65
124	71-W	Medellin	4/29/58	5/10/58	6,667	8,617.83	4/28/58	2.600	17,334.20	2,333.45	3,253.30	6,382.92	2,127.64	5,462.87	1,820.95
125	47-W	Ibague	5/5/58	5/17/58	6,122	8,877.90	5/10/58	1.653	10,119.67	2,142.70	2,987.54	(900.93)	(300.31)	(1,745.77)	(581.92)
126	6-W	Mejia	5/19/58	5/19/58	5,745	8,080.00	5/21/58 3/	1.653	9,496.49	2,010.75	2,803.56	(594.26)	(198.08)	(1,387.07)	(462.35)
127	3-W	Cartagena de Indias	5/27/58	5/27/58	8,006	9,981.33	5/26/58 3/	.938	7,509.63	2,802.10	3,906.93	(5,273.80)	(1,757.93)	(6,378.63)	(2,126.21)
128	47-W	Cali	6/6/58	6/19/58	6,197	8,080.00	6/4/58 3/	1.219	7,554.14	2,168.95	3,024.14	(2,694.81)	(898.27)	(3,550.00)	(1,183.33)

Notes: 1/ When vessel shifted to Puerto Bolivar and no Guayaquil sailing date appeared in Grancolumbiana records, Puerto Bolivar date is shown.  
2/ Baltimore arrival, no Philadelphia call.  
3/ Consolo arrival date @ N. Y.

[fol. 612]

## BEFORE THE FEDERAL MARITIME BOARD

## EXHIBIT No. 110

BALTIMORE STEVEDORING  
GRANCOLOMBIANA ARRIVALS

9/18/59 - 4/15/60

Ship- ment No.	SHIP	DATE	TONS OUT- TURN	COST	COST PER TON
1	CARTEGENA des INDIAS	9/18/59	493.995	\$ 6,104.44	\$12.36
2	TUNJA	9/25	476.971	5,786.05	12.13
3	BARRANQUILLA	9/30	497.525	6,159.40	12.38
4	GUA YAQUIL	10/9	481.515	8,139.55	16.90
5	MANUEL MEJIA	10/15	425.188	5,323.42	12.52
6	PASTO	10/22	413.678	6,945.34	16.79
7	CARTEGENA des INDIAS	10/29	476.230	5,978.86	12.55
8	TUNJA	11/6	352.733	5,125.94	14.53
9	BARRANQUILLA	11/20	410.978	5,057.81	12.31
10	GUA YAQUIL	11/27	458.330	5,133.02	11.20
11	MANUEL MEJIA	12/3	422.000	4,963.08	11.76
12	PASTO	12/11	407.780	4,007.10	9.83
13	CARTEGENA des INDIAS	12/18	506.720	6,528.33	12.88
14	TUNJA	12/23	421.865	7,584.77	17.98
15	BARRANQUILLA	12/30	467.548	7,336.80	15.69
16	GUA YAQUIL	1/7/60	482.675	5,329.91	11.04
17	MANUEL MEJIA	1/15	445.885	5,393.45	12.10
18	PASTO	1/21	465.275	4,438.06	9.54
19	CARTEGENA des INDIAS	1/29	536.688	5,178.89	9.64
20	TUNJA	2/5	486.025	7,388.14	15.20
21	BARRANQUILLA	2/12	535.762	7,273.45	13.58
22	GUA YAQUIL	2/19	482.113	5,085.82	10.55
23	MANUEL MEJIA	2/26	497.490	6,797.23	13.66
24	PASTO	3/4	505.800	8,026.65	15.87
25	CARTEGENA des INDIAS	3/11	532.908	4,983.50	9.35
26	TUNJA	3/18	477.785	4,640.01	9.71
27	BARRANQUILLA	3/25	497.487	5,127.80	10.31
28	GUA YAQUIL	4/1	550.310	5,088.41	9.25
29	MANUEL MEJIA	4/8	516.360	5,387.43	10.43
30	PASTO	4/15	547.637	6,804.98	12.43
			14,273.256	\$177,117.64	\$12.41

[fol. 613]

## BEFORE THE FEDERAL MARITIME BOARD

Docket Nos. 827, 835

In the Matter of:

PHILIP R. CONSOLO,

v.

FLOTA MERCANTE GRANCOLOMBIANA, et al.,

and

PANAMA ECUADOR SHIPPING CORPORATION.

## Transcript of Proceedings (Excerpts)

Room 4519  
 GAO Building  
 Washington, D. C.

## PREHEARING CONFERENCE—May 7, 1958

Prehearing conference in the above-entitled matter was convened, pursuant to notice, at 10:00 a.m., before C. W. ROBINSON, Examiner.

\* \* \* \* \*

## PROCEEDINGS

Examiner Robinson: Gentlemen, if you are ready, we'll go ahead. As you know, we are here for a prehearing conference on 827 and 835, the first being a complaint case, the other proceeding involving a declaratory order on bananas from Ecuador to the United States.

\* \* \* \* \*

Examiner Robinson: Who is public counsel?

Mr. Blackwelder: Public counsel intervened, Mr. Examiner, and petition has been granted. I'd like to make appearances for Edward Aptaker, Robert J. Blackwelder, and Robert B. Hood.

\* \* \* \* \*

[fol. 614] Examiner Robinson: \* \* \* If no one has anything, I have a question I would like to ask. Maybe I'm speaking out of turn, but I'd like to know why Panama Ecuador Shipping Corporation was sued as the respondent? Why has somebody not made a motion to dismiss this?

Mr. Turk: Well, if that is within the scope of the subject of simplification of issues, why we would like to state that our position now is that we are not a proper respondent, not being either a common carrier by water or another person subject to the Shipping Act of 1916, as amended; and that accordingly we should be relieved of participation by the dismissal of the complaint as to us. That seems to us to be sufficiently clear so that it might be done by stipulation here and now, rather than by a written motion and memoranda and so forth to the board. I propose, if it is in order, to do so now.

Mr. Kharasch: Mr. Robinson, our understanding is that Panama Ecuador Shipping Corporation is the exclusive contractor at present for all of the shipping space aboard the ships of Grancolombiana in this trade.

We think that this is sufficient, since they are contractors for space aboard a common carrier, to make them a person subject to the Act.

\* \* \*

Examiner Robinson: Just so that my position might be clear, I do not have jurisdiction to dismiss. That would have to be for the Board. My own view is that they have no business being in here as a respondent. Coming in as an intervenor as their interests might appear is one thing, but they can't confer jurisdiction on the Board—I understand why you want to do it, naturally, being the other party of the contract.

\* \* \*

Mr. Kharasch: We have distributed, Mr. Examiner, a four-page document which is filed both under Rule 6(d) and under the Board's new procedure recently promulgated in The Federal Register, which appears as 46 C.F.R. Section

201.211. That is presumably going to appear in due time as a rule of the Board. That's the section providing for [fol. 615] discovery and production of documents for inspection and copying prior to hearing.

\* \* \* \* \*

We would be pleased to have the responses of the two respondents in Docket 827 to our motion, our demand.

Mr. Giallorenzi: Mr. Robinson, I have looked this motion over rather hurriedly this morning. It was just handed to me. I think some of the items can readily be made available to counsel for Philip R. Consolo. However, there are a number of items which I think are confidential which I do not believe should be disclosed by Mr. Consolo; and also a number of the items are extremely burdensome and oppressive and I would like to have the opportunity to file papers in opposition to this motion which I will designate with particularity which of these items we do not wish to furnish and those which we will very gladly furnish to our opponents.

Examiner Robinson: I can readily understand why you wouldn't want to answer these now. This is the first time he has seen it, isn't it?

Mr. Kharasch: That's right. We distributed it this morning.

Could this be marked as Exhibit 1 in this prehearing?

Examiner Robinson: Yes.

(The document referred to was marked Exhibit 1.)

Examiner Robinson: I see no reason why he shouldn't have ten days to file a reply. That's what the rules provide for any motion.

This is the first one of these I've had. Is there any reason why he should not have ten day?

Mr. Kharasch: I don't want to rush Mr. Giallorenzi. The customary practice before the Board has just been to distribute lists under Rule 6(d) of information requested at the hearing or before the hearing and most of the time in the prehearing conferences it has usually been occupied

in going down the list and discussing, in front of the Examiner, on the prehearing record the information requested.

Examiner Robinson: Well, they've been very informal things, Mr. Kharasch, as you know, but this is a motion; a [fol. 616] strict motion. It comes under this new procedure and I certainly wouldn't want to rush anybody the first time we've had it. Ten days is not going to kill anybody.

Mr. Kharasch: No, it wouldn't be fair if Mr. Giallorenzi feels he needs more time.

Are you prepared, sir, to discuss any of the items?

Mr. Giallorenzi: No, I'd rather take my full ten days.

• • • • •

Mr. Kharasch: Perhaps it would help at this point, Mr. Examiner, if we indicated roughly the amount of time we expect our direct case would take. In the preceding two cases, 717 and 771 and 775, the legal or factual issue of common carriage was tried separately from the damages. We intend to be very brief on the common carrier issue. It's not going to take us very long, assuming we get this information here that we have requested to put in our evidence on that issue and we would propose to proceed right away, as part of our direct case, to damages.

We feel the law is clear enough now that there is no saving of time to anyone in trying to separate the cases, as the other cases have been split, so we could offer a rough case of a day—say a day and a half, maybe—for our direct case, including both the damages and the common carriage issue.

Examiner Robinson: Would you have any idea, Mr. Giallorenzi, as to the time? I'm not holding you to it at all.

Mr. Giallorenzi: I'd say about three days.

Mr. Lippman: Three days for your direct case?

Mr. Giallorenzi: Yes.

Examiner Robinson: \* \* \* Now, on the reparation question, I had a little note here. I wondered whether or not it would be sensible to go into that in view of all of this possible reversal. I've found over the years that reparation is a very elusive thing.

Mr. Kharasch: So have most complainants to the Maritime Board.



Examiner Robinson: I anticipate you might have a little [fol. 617] difficulty in a case of this kind. I don't know. You can just say that you've had sales and this, that, and the other. So I'm not sold on it one way or the other. That's one of the questions I wanted to ask.

Does anyone else have any thought on splitting that phase of it?

Mr. Giallorenzi: I agree with you. I think it should be split, especially in view of the pending appeal to be heard, I believe, in the fall.

Examiner Robinson: Has anyone any idea as to when that case is coming up?

Mr. Blackwelder: The Grace Line brief is scheduled to be filed in mid-June of this year, 1958.

The Federal Maritime Board's reply will be filed sometime in October. The Grace Line will then have an opportunity, if they wish, to file a reply brief to the government's brief, leaving a few months for oral argument and ultimate disposition.

I doubt very much whether it will even be decided on the next calendar in the Second Circuit.

Examiner Robinson: You mean even next year?

Mr. Blackwelder: There's a strong possibility it will not be decided next year.

Mr. Kharasch: Mr. Examiner, the decision in Docket 717 has been on the book three years.

Mr. Lippman: More than that. At least four years.

Examiner Robinson: You're talking about the original Consolo case?

Mr. Lippman: Yes.

Mr. Kharasch: That was decided June 23, 1953, almost five years now. Your decision in Docket 771 was confirmed by the Board in the banana distributors' case. We think the legal issues are very clear here. But very clear. The Board's decisions are on the books. The Board's position in the pending case in the Board of Appeals is clearly that the decision was right. The Board is defending its own position. I think in that state of the law it's only proper before this agency to treat the law as decided. It's always

possible on any legal doctrine that some day some appel-  
[fol. 618] late court may upset it. The legal issue is so  
simple, so clear-cut in our view of this case, that we don't  
anticipate a lot of time on it.

\* \* \* \* \*

Examiner Robinson: Have you an idea how long it will  
take you to put in your reparation phase?

Mr. Lippman: The estimate of a day and a half or two  
days included the reparation.

Examiner Robinson: On the whole business?

Mr. Lippman: Yes. It seems to us that reparations is  
really the only issue in this case, the only issue that hasn't  
yet been passed upon by the Board. That's what we are  
here for, essentially, and so far as holding things in abey-  
ance until the Second Circuit speaks on this petition for  
review, I don't think the Board would want to be a party to  
any such delay action which would suggest something af-  
firmative in the Board's decision.

I think we have to go ahead, irrespective of any peti-  
tions for review.

Examiner Robinson: When I issue the notice of hearing  
I'll put in there whether or not we'll include the reparation  
phase. I'll think about it in the meantime.

Mr. Kharasch: Mr. Giallorenzi, do you anticipate a great  
deal of defensive proof on the issue of common carriage?  
Is that included in your three-day estimate?

Mr. Giallorenzi: Yes, that is included.

Examiner Robinson: All right. How about the time?

Mr. Lippman: Well, with the pendency of the motion  
which Mr. Turk is going to file, and the time it will take  
to gather the information, and also the uncertainty as to  
whether we are going to have a hearing on reparations  
together with the hearing on status, I don't see how we can  
possibly have the hearing before some time in September.

Examiner Robinson: Do you want it earlier than that?

Mr. Kharasch: There's a problem of personal conveni-  
ence with the summer coming up.

[fol. 619] Examiner Robinson: I was quite surprised when  
you said September. Usually people scream for an early



hearing. It really makes no difference to me. I have nothing to consider at this time.

Well, why not leave it this way, then? Let's dispose of all these things first—the motions and this, that, and the other. Then we'll be in more position to find out when it will suit everybody and I'll get in touch with you by letter and let you express yourselves then. Is that satisfactory?

Mr. Giallorenzi: In that regard may I be heard? I have a number of trials coming up this month and in June, and as you undoubtedly know, in the civil courts everybody wants to get his case tried before the summer recess, so I will be pretty busy in the District Courts and State Courts in New York these coming months, which I know will take almost all of my time.

Then of course you have July and August coming along, which is vacation and while I take very limited ones, because I'm a lawyer, I would prefer the early part of September.

\* \* \* \* \*

Mr. Kharasch: Mr. Robinson, in the event—which we do not anticipate—that you set separate hearings on the issue of common carriage and the issue of reparation, if that division is made, we would like a very early hearing on the issue of common carriage because we think the issues are so simple.

Examiner Robinson: When you say “very early,” do you mean before September?

Mr. Lippman: Yes. My estimate of September included in it the time it would take to gather our evidence in support of our request for reparations, so if you decide to separate the two issues, we'd definitely want to proceed before September.

Mr. Kharasch: One more point, Mr. Examiner, which I should perhaps have mentioned earlier, on the issue of reparations. This probably comes under amendment to the pleading. When we get a date for hearing, we would plan to amend the demand for reparations to run until the date [fol. 620] of hearing. That is to prevent repeated necessity of a later suit for another little chunk of reparations that

would run between the time the complaint was filed and the time the hearing began.

Examiner Robinson: Well, that's a rather involved little thing, so you take care of that in your own way. I don't mean your statement is involved, but that question of bringing forward your reparations and so forth.

Is there anything else anybody wants to talk about?

Mr. Giallorenzi: As I understand this problem, you will decide whether you are going to hear the common carriage issue and reparation issue at the same time?

Examiner Robinson: That's right.

Mr. Kharasch: Would you have a conflict, sir, if—we're talking about what we argue is an unlikely event—but suppose the case were split, would you have a conflict in the next few months that would prevent an early hearing on the issue of common carriage? You mentioned some trials.

Mr. Giallorenzi: Well, as I said, May and June, with the calendars the way they are up there, I anticipate at least three or possibly four trials and it's pretty hard to get adjournments just before the summer time. I might mention I'm on the defense of those cases, so it's really the other people who are pressing.

Examiner Robinson: Well, let me ask you something, Mr. Giallorenzi. This has nothing to do with the prehearing conference, but I was reading through the papers and I notice they speak of there being no compartments in the holds of the vessels. This is general knowledge I wanted to get.

Does that mean you have no bins?

Mr. Giallorenzi: No bins. We just have holds. No bins in any of our ships.

Examiner Robinson: I haven't anything further.

Does anyone else have anything? The prehearing conference is adjourned. (Whereupon, a 10:45 a. m., the prehearing conference was adjourned.)

[fol. 621] FURTHER PREHEARING CONFERENCE—  
September 22, 1958

Vol. I

Docket Nos. 827 and 841

• • • • •

Examiner Robinson: Well, gentlemen, I don't know just where we ought to start this hearing. This hearing is a very informal thing, I hope, and I hope we can arrive at some conclusion on the question of reparation.

I heard this morning that the Grace cases are up for oral argument before the Second Circuit early in December. Had I known it was going to be that soon, I think I would have held off on the reparations in this case. Would anybody like to make a motion to defer reparation in these cases?

Mr. Kharasch: No, sir.

Examiner Robinson: Do you want to continue?

Mr. Giallorenzi: As far as I'm concerned, I would say this: That is the decision of the Board in the Grace Line cases is overruled by the Circuit Court of Appeals, that in my opinion disposes of this matter in its entirety.

I think Mr. Lippman feels that we have been dilatory—at least that I have been dilatory—in this matter in making certain applications. And as far as Grancolombiana is concerned, they would not like to have anyone get the impression that we do not want to proceed with this matter.

But, on the other hand, there is this question or this case which is going to be argued in the Circuit Court of Appeals. I happen to have in my possession the Grace Line brief, and I spoke to Mr. McKay, and, as you have already stated, Mr. Robinson, I think that it will be argued in November or December at the latest. I saw the calendar of the Circuit Court of Appeals on Friday and I did not see the Grace Line case on the calendar. There are about—

Examiner Robinson: I think Mr. Blackwell says it's noted for— What did you say? December 3rd?

Mr. Blackwell: As it stands now, the oral argument will be set for December 5th.

[fol. 622] Mr. Giallorenzi: Then they must have made a special arrangement.

Mr. Blackwell: Stipulation.

Mr. Giallorenzi: Then that accounts for it. So it will be heard on December 5th.

Examiner Robinson: Do you still want to proceed with your reparations?

Mr. Kharasch: Yes.

Mr. Kurrus: Mr. Examiner, in view of the fact that it's going to be heard in December and that thereafter I suppose it could take anywhere from three to six months to get a decision from the Court of Appeals and that somebody could apply for writ to the Supreme Court, are you suggesting that we await the final outcome?

Examiner Robinson: No, I just wondered. I thought perhaps you might want to do it yourself. That's all. I'm just giving you opportunity to say whatever you want.

Mr. Kharasch: No, sir. As Mr. Giallorenzi said, the case could conceivably affect both reparations and the issue of common carriage, but there couldn't be any justification for postponing a piece of it, and we're not willing to postpone the whole thing.

Examiner Robinson: No, I didn't have the whole case in mind. I just meant the reparation phase of it.

• • • • •

## Vol. I

Docket Nos. 827, 835 and 841

Hearing Room 818

November 5, 1958

45 Broadway

New York, N. Y.

Hearing in the above-entitled matters was convened, pursuant to notice at 10:00 A. M., before C. W. Robinson, Examiner.

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[fol. 623]

## Proceedings

Examiner Robinson: Gentlemen, if we are ready to start. I don't think we have to be formal, we all know these three

proceedings, two separate cases numbers 827 and 841 and the third one petition for declaratory order, which is Docket number 835. Let's try to keep appearances straight for each proceeding. Who appears for the complainant in 827?

Mr. Kharasch: William J. Lippman and Robert N. Kharasch of Galland, Kharasch & Calkins, 1413 K St., Washington, D. C. We also appear for the complainant, Mr. Consolo in Docket 827 and for Mr. Consolo, intervenor in the other case.

Examiner Robinson: Who appears for the respondent in all three proceedings?

Mr. Giallorenzi: Renato C. Giallorenzi and John H. Dougherty of Giallorenzi & Cichanowicz, for Flota Mercante Grancolombiana, S.A., 26 Broadway, New York, N. Y.

Examiner Robinson: Who appears for complainant in 841?

Mr. Page: Richard Kurrus and Paul D. Page, Jr., Suite 423 Washington Building, Washington 5, D. C.

Examiner Robinson: Any appearances for intervenors?

(No Response.)

Examiner Robinson: All right, haven't been announced. Who appears for Public Counsel?

Mr. Blackwell: Robert J. Blackwell appears as Public Counsel in all three cases.

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Vol. II

November 6, 1958

• • • • •

PHILIP R. CONSOLO was called as a witness and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Lippman:

[fol. 624] Q. Will you state your name for the record, Mr. Consolo?

A. Philip R. Consolo.

Q. Where do you reside?

A. 4425 North Michigan Avenue, Miami Beach.

Q. Are you the complainant in Docket 827?

A. Yes, I am.

Q. Are you Philip R. Consolo who was the complainant in Docket 717?

A. Yes, I am.

Q. What is your occupation?

A. I am a banana importer.

Q. How long have you been engaged in the importation of bananas?

A. I would say in the neighborhood of about 15 years.

Q. During that time have you been connected with several importing ventures?

A. Yes, I have.

\* \* \* \* \*

Q. Are you familiar with the persons who purchased bananas in the United States that you import?

A. Yes.

Q. Have you had dealings with them from time to time?

A. Directly to sell them bananas?

Q. Do you know these people?

A. Yes, I do.

Q. Is it important to them to have bananas arrive on a regular weekly basis?

A. Yes, it is.

Q. Will you tell me why?

A. Well, a purchaser of bananas or a jobber as we refer to, depends on you for a source of supply for bananas, expects at least one shipment a week in order to be in business. Generally, the big companies have two or three, some four arrivals a week, so that a man who uses one car of bananas a week would like to have two or three times purchasers during the week from an importer so that you must have at least a weekly arrival to serve the trade satisfactorily that you are dealing with.

\* \* \* \* \*

Q. Would you next consider the item for freight paid on fruit to Puna, what does that cover?

A. That covers a freight charge for inland transportation as we refer to it in Ecuador depending on the area where the fruit comes from, but generally if we go to areas [fol. 625] that are further away from Guayaquil we pay less money for the fruit, so to balance off our inland freight charges that when it gets to Puna it would be the same cost per stem.

Mr. Dougherty: In other words, there would not be a difference in expense?

The Witness: As far as Puna is concerned, in other words, if we go to Baba to buy fruit, this is just a figure, and we pay 20 sucres at Baba and the prevailing price is 23 sucres we pay 20 sucres at Baba if we bought bananas at Duran where the transportation is only one sucre to Puna, then generally the price at Duran is 22 sucres so that our cost at Puna for whatever areas we obtain fruit is not any greater.

. . . . .

### Vol. III

November 7, 1958

Q. Mr. Consolo, if you had been able to import an additional volume of bananas since November of 1955, would your selling expenses have been higher or lower?

A. I believe it would have been lower to some degree.

Q. Will you explain your answer?

A. Yes.

Q. Go ahead.

A. If you are employing five thousand stems of bananas and you went to a selling agent or you had to sell them yourself and made a deal with him, he probably would charge you 5 per cent, and that's just a general practice, but if you had fifteen thousand stems or eighteen thousand stems, I am quite sure that as selling agent he would probably take 4 per cent or  $3\frac{1}{2}$  per cent for selling the

fruit, because of the larger volume and he has a fixed overhead that he has to overcome.

Mr. Giallorenzi: I move that answer be stricken. The witness says, "I'm quite sure"; he doesn't know—he's positive. It again goes to this point that I have been stressing throughout. There are a lot of ifs and buts as far as damages are concerned, speculative.

Mr. Lippman: Mr. Examiner, Mr. Consolo has been in the business for seventeen years. I think he certainly qualifies as an expert in the trade and he can certainly express his thinking as to what effect the additional volume would have.

[fol. 626] The Witness: I can go further.

Mr. Lippman: Just a second.

Examiner Robinson: Let him go.

The Witness: I can go further and say from the present selling agent and the past selling agent that I had in New York City, they would be very happy to receive 4 per cent instead of 5 if I had the additional volume.

Examiner Robinson: Objection overruled.

Q. Would an additional volume of importations have affected your overhead expenses in any respect?

A. To some degree, yes.

Q. Can you estimate it for us?

A. Well, such as additional cables, extra telephone calls to get reports on that extra cargo, maybe making an occasional trip to New York more frequently, and that's about the situation—the only additional expenses that I would have.

Q. Would you consider it a nominal or a substantial difference?

A. Nominal.

Q. What was your answer?

A. Nominal.

• • • • •

Q. Are the people shipping bananas on the Grace Line today, the same who had been allocated space as a result of the Board's decision in Docket 717 and Docket 715?



A. No.

Q. Who has fallen by the wayside?

A. Swanee Fruit and Steamship.

Q. How much space do they control?

A. Three-quarters of a chamber.

Q. They are no longer shipping?

A. Since October, 1957—since October, 1958.

Q. Who succeeded to their space?

A. You want the total or you just want one by one?

Q. Let us take each one who has dropped out, and if you can, will you please tell us who now controls the space?

A. I think it would be easier to take the one who dropped out.

Q. As you please.

A. Swanee Fruit and Steamship Company dropped out [fol. 627] with three-quarters of a chamber. Grayson dropped out with one-quarter of a chamber.

Mr. Giallorenzi: Will you give us the dates when they dropped out?

The Witness: This is all 1958, I believe October. I haven't got the exact dates, but I think that's when the changes took over.

A. (Continuing) —El Morro with one-quarter of a chamber, Lebantino with one-half chamber.

Q. Will you tell us who succeeded to the space surrendered, Mr. Consolo?

A. There was Turino, I believe, fell out before October, '58—Turino fell out before 1958. Now, who succeeded the space?

Q. Yes.

A. Banana Distributors increase one-quarter of a chamber, took over Turino, because they were on the same space with Turino.

Q. That was on the freighter?

A. Yes. When El Morro left, there was one-quarter on the passenger vessel—West Indies took.

Mr. Giallorenzi: You said passenger.

Mr. Lippman: I think you misspoke yourself. You said passenger when you meant freighter.

The Witness: Freightier.

Q. Go ahead.

A. One-half chamber on the passenger ship of Lebantino, Mr. Noboa has taken that space over. The space the Swanee Fruit and Steamship that Grayson held, Noboa has taken that over, also.

Q. Have there been any additional changes?

A. Not to my knowledge.

Mr. Dougherty: Whose one-half chamber did Noboa take?

The Witness: Lebantino.

Q. Then as I understand your testimony, Mr. Consolo, Mr. Noboa is at the present time sharing space on the passenger vessels with Messrs. Morey and Staff?

A. Yes.

Q. Mr. Consolo, do you require additional steamship space for the importation of your bananas from Ecuador to North Atlantic ports of the United States?

A. Yes.

[fol. 628] Q. Is additional space available to you on the Grace Line, Mr. Consolo?

A. No.

Q. Have you attempted to obtain refrigerated space on the Grancolombiana Line?

A. Yes.

\* \* \* \* \*

Q. Mr. Consolo, you also testified that you would have been able to purchase an additional quantity of bananas in Ecuador?

A. Yes.

Q. At prevailing market prices?

A. Yes.

\* \* \* \* \*

Q. What determines the market in Ecuador?

A. Generally the larger exporters—and it is common knowledge among all suppliers and growers and producers as to the price they pay, and generally the smaller importers such as myself just follow suit and pay the same price to the suppliers, producers, or growers.

Q. Would it have made any difference in the market in Ecuador—

Mr. Lippman: Strike that.

Q. Would an additional volume of exportations of 14,000 stems each week have had any effect upon the market in Ecuador?

A. No. It's an insignificant amount for the total amount shipped out of Ecuador.

\* \* \* \* \*

Cross examination.

By Mr. Giallorenzi:

Q. Mr. Consolo, you testified that you have been engaged as an importer of bananas for the past fifteen years, is that correct?

A. Yes.

Q. You have imported these bananas from various areas in Central and South America, is that correct?

A. That's correct.

Q. Prior to the obtaining of space on the Grace Line vessels, which was in September of 1953—

A. Yes.

Q. (Continuing) —you imported these bananas into the Miami area, is that right?

A. Yes, sir.

Q. You make your home at 4425 North Michigan Avenue?

A. Yes.

Q. Or is that your business address, Mr. Consolo?

A. That's my home.

[fol. 629] Q. That is your home?

A. Yes.

Q. You have lived there during these past fifteen years, I take it?

A. Not at that particular address, but in the general area.

\* \* \* \* \*

# Vol. IV

November 11, 1958

Q. Did you discuss the ports of delivery and arrival?

A. We talked about Baltimore, Philadelphia, New York, and there was no sense of going into details, as to what port we were going into, unless we come to an agreement on price.

\* \* \* \* \*

Q. Isn't it a fact that that is what you wanted, ships to go to Jacksonville?

A. I would take Jacksonville, yes, maybe seventh morning delivery.

Q. You would prefer Jacksonville where you have your organization?

A. Maybe I would have preferred Jacksonville, I would have taken Baltimore, Philadelphia, or New York on the proper days.

Q. Didn't you tell the Grancolombiana people that your preference was Jacksonville, because it was closer to your base of operations?

A. No, not a question of closer, a question of less days of arrival into the United States, Jacksonville.

Q. And arrival days are important?

A. They are.

Q. And again I say to you, before discussing price wasn't it of paramount importance to you to find out definitely from the management, how long it would take vessels to come to Baltimore, Philadelphia or New York, yes or no?

A. No.

\* \* \* \* \*

November 12, 1958

\* \* \* \* \*

Redirect examination.

By Mr. Kharasch:

\* \* \* \* \*

Q. Mr. Giallorenzi asked you some questions concerning meeting of Grace Line shippers. Do you recall that discussion?

A. Yes.

[fol. 630] Q. I don't think he brought out what benefit was proposed—I don't know whether proposed is the right word, what benefit was there to be to the Grace Line shippers if the Standard Fruit obtained space on Grace Line ships.

A. Well, benefit that Grace Line shippers would have received if Standard had received space in Grace Line ships, providing that they would have stopped their Ecuadorian importations into New York City would have been, we believe, anyway, would have been better prices.

Mr. Giallorenzi: That is the Standard Fruit. The question is what benefit would the Grace Line have derived.

The Witness: All the Grace Line shippers would have received, if Standard Fruit took two chambers on the Grace Line, and three chambers, and stopped their importation of Ecuador fruit, ship to ship. There was 35,000, or 40,000 stems lost coming into New York. The Grace Line wouldn't increase, 35,000 or 40,000 stems less.

Q. In other words, it was stopped by this company?

A. Well, stopped.

Q. And would even lessen the supply of bananas coming into New York?

A. Yes, that is correct.

Q. As I understand your testimony, nothing ever came of this?

A. Not a thing.

Q. Other shippers on Grace Line gave up their space between October 1957, and October 1958?

A. Other shippers?

Q. Shippers other than you gave up space?

A. Oh, yes, they did.

Q. Did you ever give up any space?

A. No, I did not.

Q. How much space did you request from Grace Line on October 1957 when they were executing the new contract?

A. If my memory is correct, it was 50,000 cubic feet.

Q. Again, just so the record is clear, prior to October 1957 you had a weekly arrival on Grace Lines passenger vessels, and approximately bi-weekly for the nightly arrival on the freighter vessels?

A. That's correct.

[fol. 631] Q. In October 1957, even though Grace Line put you on more freighter vessels, so that the freighter service became weekly, nevertheless you were cut down to one arrival a week on the freighters?

A. That's correct.

Q. Did the Grace Line ever pay you at any time since 1955 an allowance of \$1,000.00 a sailing?

A. Since 1955?

Q. Yes, sir.

A. No.

Q. Did they lower the rate?

A. Lower the rate?

Q. Yes.

A. They did not.

. . . . .

Q. Have you imported bananas in several ports in the United States?

A. Yes, I have imported bananas in Miami, Tampa, Fort Everglades, Florida, New York, Baltimore, and I think in the strike period, a few into Charleston.

Q. How about Philadelphia, have you had a shipment to Philadelphia?

A. I think one shipment to Philadelphia, yes.

Q. The answer is yes?

A. Yes, one shipment to Philadelphia.

Q. Are you familiar with the banana market in the United States? Do you know first how business is done, and do you personally know many of the banana buyers?

A. Yes, I know many of the banana buyers.

Q. For how many years has the banana business been your principal business?

A. 13 or 14 years.

Q. With respect to Mr. Giallorenzi's attack on your financial ability, would you recall to me the figure which you said was necessary to finance the entire, or use of the entire refrigerated space on Grancolombiana Line, I believe it was?

A. South America, from South America?

Q. Doing business in the United States with a commission merchant?

A. In total he was trying to separate it.

Q. No, I want the total figure.

A. I would say about \$200,000.00.

Q. Would you require less, or more, or the same amount of money if you had just a portion of this space?

A. You would need less money, yes.

[fol. 632] Q. Would you require proportionately less?

A. It may be if you had less it wouldn't be exactly proportionately. It may be \$10,000.00, \$15,000.00 in excess to the proportion.

Q. Because of the necessity of setting up a separate organization?

A. That is it.

Q. Suppose now, Mr. Consolo, Grancolombiana Line had ordered you one-third of the refrigerator space.

Mr. Giallorenzi: I object here. This is purely hypothetical. Why pick one-third?

Mr. Kharasch: That is the figure we pick as a fair and reasonable allocation.

Examiner Robinson: Might have some hypothetical significance on both sides. I wouldn't worry too much about that.

Mr. Giallorenzi: Mr. Dougherty advises me that you threw out the last hypothetical question on this very point.

Examiner Robinson: That was beyond hypothetical; that had no foundation at all.

Mr. Kharasch: I will give you a foundation for the one-third. There are two complainants. They are here.

Examiner Robinson: I am not worrying about that.

Q. How much extra capital would you have had to commit to the banana operation in order to ship bananas on one-third of Grancolombiana space?

A. I have to go back to find out how much deposit would be due to Grancolombiana for one-third.

Q. Taking the figures that you had which I see you have them in front of you again.

A. One-third of that would be 17,000; two shipments take a figure of 5,000 stems would be one-third, roughly two shipments of that would be—

Mr. Kharasch: Off the record.

Examiner Robinson: Off the record.

(Discussion off the record at this point)

Q. Mr. Consolo, just so we get the pending question in exact terms, I am asking in terms of your own operation [fol. 633] how much extra capital, extra money would be necessary to be committed to it to ship an additional 5,000 stems which Mr. Kurrus points out is the high side, to be perfectly safe.

A. About \$80,000.00.

Mr. Blackwell: About \$80,000.00?

The Witness: Yes.

Q. Have you at all times since November 1955 had available to you a line of credit from a United States bank in excess of \$80,000.00, let's say \$100,000.00?

A. Yes.

Q. Have you this morning made arrangements to obtain a written statement from a bank to that effect?

A. I have made two arrangements this morning.

Q. Let's take this one first.



A. I have made arrangements. Funds were available to me from 1955 from one bank in the amount of \$100,000.00.

Q. All right, sir. Now, with respect to the second, please go on and tell us what the second account is?

A. Second arrangement is a credit is being established for me in Miami as of presently of \$200,000.00.

\* \* \* \* \*

Cross examination.

By Mr. Giallorenzi:

\* \* \* \* \*

Q. You testified that the entire No. 4 upper tween deck which is used by you and your brother on the contract, I don't know who it is used by on the contract, did carry at least 6,000 stems?

A. Depending on the size of the stems.

Q. Pardon me?

A. Depending on the size of the stems, about 57 to 63, that's depending on the size of the stems. I think that's about the figure.

Q. On May 7, 1958 on the Santa—rather you conceded you furnished me with that document?

Mr. Kharasch: The document is a Dixon and Company cargo outturn sheet dated May 7, 1957.

Mr. Giallorenzi: This one here, Santa Rita. I would like to mark those for identification.

[fol. 634] Mr. Kharasch: Yes, they were furnished you.

Examiner Robinson: Which is which?

Mr. Kharasch: You prefer them separately?

Examiner Robinson: Makes it easier. First one will be No. 38 for identification which is that?

Mr. Giallorenzi: Santa Ines.

Examiner Robinson: What is it called?

Mr. Giallorenzi: Cargo Outturn Sheet.

Examiner Robinson: Second one will be marked Exhibit 39 for identification, Cargo Outturn Sheet dated August 13, 1958.

Mr. Kharasch: Mr. Giallorenzi, since you are offering them, I assume you would be getting extra copies of them, would you be kind enough to delete the names of purchasers in the United States?

Mr. Giallorenzi: Yes, I will. I don't believe Mr. Dixon would want that.

Q. Will you tell us, please, looking at Exhibits 39 and 39, the amount of banana stems which were carried on these two particular trips?

A. I think 6,500; that's on Exhibit 39.

Examiner Robinson: Exhibit 39 says 66, or 9 manifests, and this one over here says manifest is 4631. Exhibit 39, if I may correct that says 6609.

Q. Now, there is a difference, roughly, of about 1,979 stems during that period of time. Can you tell us why you shipped almost 33 $\frac{1}{3}$ % less on those two shipments if bananas were so readily available?

A. Well, there could be many factors on that.

Q. Let's hear some.

A. I would have to refer to the Ecuadorian books in Ecuador. There may be a barge mistake. We have had occasions where barges missed up, and had not shipped in time from the area where it came from. We had an occasion where the barge sunk with fruit and didn't get to the ship. We have had occasions where the tugboat broke down, and then we resold the fruit. There are many things, and I couldn't tell by looking at this here, tell you why this ship had 4,631 stems, and this ship had 465 stems. It could [fol. 635] have been that the market the previous weeks to that may have been lower, and I gave him instructions just to get the best fruit. I don't care what the shipments cost. Our problem was losing \$1.50 a hundred here on bananas. It didn't make much difference to me whether I shipped 4,000 stems, or shipped 6,000 stems. My loss would be the same, so I actually can't tell by looking at these two shipments whether this was 6,500 stems on August 13th, and this was 4,631 on May 7th.

Q. You mean your loss would be greater if they shipped a greater amount rather than the same?

A. If the market is that much variation?

Q. Yes.

A. Yes, it could be. I will even go further. There has been shipments where it would have been cheaper for me not to ship any bananas, just pay the freight. I can't answer you by just looking at these two what the reason for it is.

Q. Let's take a look at the market at this particular time.

A. You have to go back 10 days.

Q. Take a look at the market on May 7, 1958. This is the price you received. What is the range on the greens as they call them, the price range?

A. Six and one-half, and six.

Q. All right, what is the price range on the greens on August 13th which incidentally is Exhibit 39. The other one was Exhibit 38.

A. About the same price.

Q. The same, so it couldn't be the market.

A. Just one second. Let me complete this. This wouldn't reflect the market. You have to get the shipment before this to get the market because this is 15 days later after loading. You have to get two weeks before this to get a true picture of the market. The market could have changed while this shipment was in transit. In other words, the two weeks before this shipment would give you the actual market price for me to determine.

Q. Let's take a look at two weeks before.

A. On April 15th.

Q. That was May what?

A. May 7th you are referring to. It would be around April 15th, or April 22nd, that week.

Mr. Giallorenzi: The market about April 17th, we better mark this for identification, 40.

[fol. 636] Examiner Robinson: Information on shipment and so forth is marked Exhibit 40 for identification.

Mr. Kharasch: Same understanding, Mr. Giallorenzi, on each.

Mr. Giallorenzi: This is the Santa Rita Outturn report which is dated April 17, 1958.

Examiner Robinson: Yes, that is Exhibit 40 for identification.

Q. Now, the market on that date ranged from what?

A. Four and one-half cents a pound for green fruit, green selects, and about three and one-half on ripens, and rejects.

Q. So you attributed the lesser amount to the market?

A. I wouldn't exactly attribute it to the lesser market. I may have wrote him a letter the market is weak here two weeks before, tell him to get a strict selection, don't ship perfect stems because at \$4.50 a hundred pounds I would lose more money than taking in the fruit. I would be losing less by shipping less bananas.

Q. Now what—

A. (Interrupting) Let me see what the average weight is, maybe I can justify it by an average weight. I haven't got an average weight here. Just checking, for example, I am going over it fast. I noticed on this shipment over here my average weight was 77 pounds.

Q. Right.

A. From this total here.

Q. That would be?

A. On April 17, 1958.

Q. Exhibit 40 for identification.

A. All right, now on this shipment over here, what probably may have happened—

Q. (Interrupting) which is Exhibit 38.

A. That would be two weeks later.

Q. May 7th.

A. That would be in transit from the time he gets my letter. I noticed I averaged 80 pounds on this, so it probably was due—I am not saying it was probably due to the bad market. I told him to make a strict selection, get the best fruit possible. I don't care what you ship. I will lose more money in the United States than if I ship the fruit; that probably could be.

Q. How many stems can a barge carry?

A. That varies with different barges.

\* \* \* \* \*

[fol. 638]

Vol. IX

Hearing Room 3535,  
General Accounting Office,  
Washington, D. C.  
Thursday, November 20, 1958.

\* \* \* \* \*

JACK FRIEDLANDER was called as a witness, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenzweig:

Q. Mr. Friedlander, what is your occupation?

A. I am the General Manager of the Ecuadorian Fruit Import Company.

\* \* \* \* \*

Q. Now, what aspects of the banana business have you informed yourself about in the course of your employment?

A. The purchase of bananas in Ecuador, the selection for quality to be loaded aboard the ships, the transportation from the different areas to the ship, loading aboard the ship, transportation from the port of loading to Philadelphia and distribution and sales.

Q. And in learning and broadening your experience in the banana business have you had occasion to make visits to Ecuador which is the source of the bananas?

A. I have been in Ecuador, I think, thirty times. I was employed by Ecuadorian Fruit.

Q. And while you have been in Ecuador how many ships have you loaded there?

A. Well, I have loaded about, I would say, fifty or sixty of the Grancolombiana vessels, because on each of these trips I stayed for one week, and I can remember one occa-

sion when I stayed for five weeks, and maybe ten Grace Line vessels.

Q. Incidentally, how long has Panama Ecuador been on the Grace Line vessels?

A. Since the middle of October 1957. As a matter of fact, I was at the first loading.

\* \* \* \* \*

[fol. 639] Q. Your company has been on the Grace Line vessels, has it not, since the Grace Line vessels were first made generally available to banana shippers?

A. Yes, I was at the first loading at Puna.

Q. And approximately what number of Grace Line loadings have you witnessed?

A. About ten.

Q. Since October 1957?

A. That is correct.

Q. Now, turning to out-turns on the arrival of vessels on the Atlantic Coast of the United States. How many of the outturns of Flota vessels have you witnessed since September of 1955?

A. Well, we have had about 164 loadings so far, and I have been at every one of them outside of the times I was in Ecuador. You subtract one from the other.

Examiner Robinson: Let's get our thinking straight. He said that there has been 160 loadings, and you have been present. You mean unloadings, don't you?

The Witness: Unloadings.

\* \* \* \* \*

Examiner Robinson: What is the difference, if you know, between the width of the side port, that is, the opening itself, not the doors, on the Grace ships and the Flota vessels?

The Witness: The Grace side ports are, I would say, a minimum of two feet wider and higher. The Flota side ports are higher up from the waterline so that the angle of incline from the pontoon to the side port is much steeper.

\* \* \* \* \*

Q. Now, then how many decks do the Flota vessels have as compared to the number of decks of the Grace Line vessels?

A. They have three decks, and No. 3 hold, upper tween deck, lower tween deck, and lower hold.

Q. And in your opinion, does the number of decks which are required to be loaded affect the difficulty of operation?

A. No question about it. That completely changes the problem.

Q. And does it make the problem a simpler one or a more difficult one?

A. It makes it very, very difficult to load the extra deck [fol. 640] because time is of the essence and there are still only the same two sideports to load an equal number of stems.

Q. Now, then the process in loading the Flota vessels is the same as loading the Grace Line vessels to the point at the pontoons come alongside the vessel; is that not correct?

A. To that point.

Mr. Kharasch: I don't think that was his earlier testimony, to keep the record straight. I thought you said the Flota vessels are 100 yards offshore at Puerto Bolivar and the Grace Line vessels are 20 miles down the stream.

The Witness: That is correct. Fruit comes mostly from different areas to Puna, and it is more close to Guayaquil than it is to Puerto Bolivar.

By Mr. Rosenzweig:

Q. But the starting point is the same and the pontoon is alongside the ship.

A. Port and starboard.

Q. Port and starboard. Now here they are unlike in the case of Grace where you use both port and starboard sideports?

A. We are the only loaders.

Q. You are the only loaders. Now, then the first step, I take it, is to rig the stage from the pontoon to the side port?

A. The first stage is to open the sideport, and then we have to send carpenters in to arrange the stanchions and bin boards because they are never arranged properly.

Examiner Robinson: The stanchions don't remain permanent?

The Witness: No, we remove them when we unload the fruit and Flota spreads them all over. They load general cargo in this hold on the way southbound.

Examiner Robinson: How about the Grace vessels, are the stanchions knocked out each time, too?

The Witness: They are knocked out, too, but the crew on the Grace vessels arrange the stanchions and bin boards before the loaders come on board. They do not do that in the case of the Flota vessels.

[fol. 641] By Mr. Rosenzweig:

Q. Now, then how does the angle of inclination of the stage from the pontoon to the port on the Flota vessels compare with the angle of inclination of the stage from the pontoon to the sideport of the Grace vessels?

A. Anyone would have no hesitancy to walk up or down the incline on the staging on the Grace vessels to the sideport, but almost every American that I have seen going out on the Flota loadings sort of hesitates and has to be given a helping hand to go either up or down the staging because the angle of inclination is so steep.

Q. Now, the sideport in the Flota vessels opens unto the upper tween or the top deck of the three decks; is that not correct?

A. That is correct.

Q. And in order to load the vessel what is the next step after your crew of men has come aboard the ship?

A. Our carpenters are to array the stanchions and bin boards. The riggers rig the staging from the pontoon to the sideport, and the staging, the double stages from port and starboard, from the upper tween deck to the lower tween deck, lower tween deck to the lower hold, before they do that, they have to take the plugs, hatch covers,



floor boards out and put them to one side on the upper tween deck and the lower tween deck. Then they are able to rig their stages.

Q. Now, will you state for the record what these plugs are?

A. These plugs are insulated members that fit between the beams that run port to starboard in the square of the hatch. There are exactly four sets of plugs in the square of the hatch, and there are three plugs in each section between each beam.

Q. So there are, if my multiplication is correct, a total of 12 plugs to be handled?

A. That is correct.

Q. Will you estimate the weight of each of the plugs?

A. Well, I have seen five or six or seven stevedores working in coordination to move one, not to lift it, just to drag it.

Q. Now, then the Grace Line has no such plugs?

A. The Grace Line has no such plugs. It has only the hatch covers and floor boards.

\* \* \* \* \*

[fol. 642] Q. Now, then, Mr. Friedlander, directing your attention to Exhibit 69, will you please state for the record what the facts of the arrangement of this vessel disclosed by this picture, how the facts of the arrangement of the vessel as disclosed by this picture affect the problems of stowage of banana cargo?

A. As I explained to you before, we have to remove the plugs and the hatch covers and the floor boards, floor racks, from the lower tween deck and the upper tween deck and move them mostly forward of the square of the hatch because there is very little room aft of the square of the hatch to stow this gear. We can't stow this gear either to port or starboard of the square of the hatch because the men are coming in from the pontoons and the banana barges and going down the stages that we set up to go down from the upper tween deck into the lower tween deck and then into the lower hold. There are little notches in this photograph which indicates where the beams are. We don't take those out of position. Those are left in the square of the hatch

because we put our staging down in between the beams and load down on the stages. We have a very sharp incline, a much sharper incline on the Flota vessels on the stages from the lower tween deck, from the upper tween deck to the lower tween deck, and then down into the lower hold because of the difference in the height of the decks.

\* \* \* \* \*

Q. Now, examining Exhibit 13 in evidence, Mr. Friedlander, what does that disclose to you or how does that arrangement of the vessel which is there portrayed affect the loading?

A. It will only admit—

Q. What will only admit?

A. The sideport as shown in this photograph will just about admit one stevedore coming in with a bunch of bananas and another one going down to get another bunch of bananas. The door is very narrow, much narrower than the Grace Line sideport. We tried to get these made larger when these ships were built, and Captain Sanchez said that the insurance company that approved the design of the ships wouldn't allow it.

\* \* \* \* \*

Q. Now, then we were at the situation, Mr. Friedlander, [fol. 643] where assumedly there would be somewhere between six and ten shippers aboard the Flota vessels, and I asked you what in your opinion would be the effect upon the loading of the Flota vessels if those conditions prevailed.

A. I asked you friendly or unfriendly?

Q. I think Mr. Giallorenzi supplied the word, neutral.

A. Are you talking about just the loading operation now?

Q. That is right.

Mr. Kurrus: Do you mean friendly shippers or what?

The Witness: Yes.

Mr. Kurrus: Mr. Friedlander is reading something to get the answer to the question. Can we see what he is reading?

Examiner Robinson: No. Why don't you just hold your horses for a minute?

By Mr. Rosenzweig:

Q. Go ahead, Mr. Friedlander.

A. I think it would delay the loading between ten and fifteen hours at a minimum. It would depend on certain factors whether it would be ten hours or fifteen hours, or it might even conceivably take another twenty hours.

Q. So it would be your opinion then that the—

A. You are talking about six loaders now?

Q. Six loaders. It would be your opinion then that the time would, stated generally, perhaps be at least double, if not more than double?

A. That is correct.

Q. Now, will you please explain for the record what the conditions are which would bring about this increased period of time?

A. Well, as we start loading now we are loading from pontoons tied to the Grancolombiana port and starboard side ports. We enter into the lower hold a maximum number of stacker teams that we can utilize to take the stems away from the carriers. We also store fruit into four positions on the upper deck. This results in quite a rapid entry of fruit from the banana barges to the ship until we get into the area around the well and square of the hatch, because the area that has to be loaded first where you employ the maximum number of stackers is in the aft end of the ship [fol. 644] since the bulk of that fruit is ahead of the feed to the machine in the low position. As we start to complete bins in the lower hold, which surround this well position, and particularly the square of the hatch, we have to take our stages out of the aft portion of the square of the hatch to permit the stowage of fruit in this area.

Q. Now, at that point if presumably you had your one set of stages of your own descending into the lower hold and one other shipper—and this assumes, I emphasize, only one other shipper—had the other set of stages, what would happen when you came to the area of the hatch and it became necessary to remove one or the other set of stages so as to fill with bananas the area which that set of stages occupied?

A. You would have to have access, one shipper would have to have access to the same set of stages, or to the stage that was remaining.

Q. And that would then present the problem of the stevedores who were bringing the bananas aboard the vessels comingling the fruit?

A. One would have to suspend loading. You couldn't possibly comingling the fruit.

Q. You could not rely upon the stevedores to deposit the fruit on the side of the ship which was available to the owner of that fruit?

A. That is correct.

Q. Now, then if there were no common use of the one stage-set of stages that were left, what would be the necessary procedure?

A. The area in which the stages had been removed would—the fruit would have to be passed down into that area by hand from the lower tween deck to the square of the hatch into the lower deck.

Q. And the effect of that would be?

A. The passing down of the fruit would slow the loading time by ninety percent.

Q. Now, then these same consequences would follow, would they not, on the lower tween deck and the mid-deck?

A. You would have the same problem as you started to surround the well area of the tween deck and you started to go into the area to finish that area up. You would have the same problem with the stages.

Q. And meanwhile, of course, the upper deck would have [fol. 645] remained empty?

A. There would be no fruit in the upper deck because the shippers would not have the availability of their barges alongside of the side ports.

Q. And what of the problem of removing the stages altogether?

A. When we start to remove the stages that enter from the tween deck into the lower deck, we remove the stages that go from the upper deck into the tween deck. We just replace them, this set of stages, and this tween deck starts

to go unto the pontoon or out of the ship, and this takes its place, and when we get through with this set of stages in the lower deck, this set goes out into the pontoon, and this takes its place. When we take these stages out the entrance of fruit has to be stopped into all decks.

Q. Now, then how would the procedure of replacing the plugs and the floor boards, the hatch covers and the floor boards be affected by this?

A. Well, if there was one set of stages, and this loader was denied the use of these stages.

Q. Now, Mr. Friedlander, please bear in mind that you are pointing to the diagram which doesn't appear in the record.

A. Yes. If the stages that were rigged from the tween deck into the lower deck on the aft portion of the square of the hatch had been removed, and this shipper said, "These are my stages. You can't use them," and I was loading the aft portion of the ship or the starboard portion of the ship, I would then have to pass this fruit down to stackers by hand.

Q. And, of course, the more time that is consumed in the lower hold delays to that extent the replacement of the plugs between the tween deck or in the ceiling of the overhead of the lower deck, is that not so?

A. That is right. This movement would slow down at least ninety percent. That has been our experience. When you start to pass stems of fruit down, you slow the process down by ninety percent when the procedure is using the stages.

Q. Then, of course, there would be the same loss of time on the tween deck?

A. There would be the same loss of time in this area, because then this staging—

[fol. 646] Q. In this area, you are referring to the lower deck?

A. In the lower deck, the staging, and eventually in the forward part of the ship has to be removed in order to stow fruit in the area that this staging occupied, and this fruit

has to be passed down by hand whether there are one shipper or three shippers in this particular lower deck.

Q. Now, then, of course, what you have so far described has assumed the existence of two sets of stages?

A. That is correct.

Q. And unless there were common ownership of such stages or a common use of such stages, the problem would be aggravated, would it not, when a third shipper was introduced?

A. It would be even aggravated with two shippers if there wasn't common usage because instead of passing the stages out, as we do, they are in the tween deck portion of the ship. This stage in the tween deck would have to be removed. This shipper would have to take his staging out in the lower deck and get his staging in the tween deck would have to be put back again.

Q. And I take it that in addition to the problems which you have described and the loss of time which would necessarily result, there would then be the loss of all the time which is gained in your loading of the top deck?

A. Yes, not only the top deck, but as we start to crowd in here we use the stage in the forward part of the square of the hatch to load the aft part of the square of the hatch, and as this operation slows down we are starting to send teams of stackers into the tween deck to stow the wings of the tween deck, where the plugs and the hatch covers and floor boards are not occupying any space so that by the time we finish the aft portion of the lower deck we are then able to take part of the plugs and hatch covers and floor boards to cover this area to make more space available in the tween deck to stow fruit.

Q. So that there would be a loss of efficiency and an increase of time by the delay of operations on the tween deck as well?

A. Surely, because it is our fruit now on both sides of the vessel, and if the stevedore is carrying the fruit from either side to see that the men who are passing the fruit down aren't taking it fast enough, instead of passing it to these men, they just spread it down into the tween deck. The

[fol. 647] stackers are stowing the fruit in the tween deck. Of course, at this time the larger stems go into the top deck.

Q. Now, then would you please venture an estimate as to the additional time which would be involved in loading of Flota vessels if there were ten shippers?

Mr. Kurrus: I thought the last question was six to ten.

The Witness: I was only answering as to six shippers. I will have to change all my answers if there were ten.

By Mr. Rosenzweig:

Q. Have your answers been based upon six shippers?

A. Yes.

Q. Now, will you kindly assume there were ten shippers?

I am going to assume for facility that there are only three shippers in each deck. I assume four in this lower hold and three in each of the top other decks. Of course, this deck generally holds as much fruit or more than the other decks.

A. I would estimate it would take about fifty hours to load the vessels.

Q. I take it it would be in your judgment just a matter of confusion worse confounded?

A. It would be complete and total. I didn't want to use the same phrase, confusion. I would have to think of something worse than that.

Mr. Kurrus: Chaos?

The Witness: Worse than that.

Mr. Lippman: Disaster?

The Witness: Disaster would be a good word.

\* \* \* \* \*

Q. Now, then, Mr. Friedlander, would you explain for the record why it is possible in your judgment for fruit to be carried aboard the Grace Line without the consequences which you have described would result from allocation of space of shippers aboard Flota vessels?

A. First of all, you only have the two decks on the Grace vessels, as I explained previously, which even in our particular hold on the Grace Line permits loading within 12 hours.

Q. That is with three shippers using the one hold?  
 [fol. 648] A. That is correct. Of course, only roughly between ten and eleven thousand stems are loaded into that one hold versus approximately fifteen thousand stems loaded into the one hold of the Flota vessel, but the refrigeration system on the Grancolombiana vessels totals approximately fifty horsepower per deck, while the refrigeration systems on the Grace Line vessels total approximately 100 horsepower per deck, which is mathematically double.

Q. Then is it not a fact that both the time consumed in loading the Grace Line vessels by multiple shippers and the time required by the vessel to bring the temperature down to the level required for the safe carriage of the fruit are both well within the tolerances which you have described?

A. Also the ventilation system is well within the tolerances. On the Grace Line they force fresh air into the holds. On the Grancolombiana the air introduced into the holds is induced into the hold by the exhaust blower, which has a capacity of 20,000 cubic feet of air per hour, 20,000 c.f.m. per minute. Exhausting the air from the hold, the fresh air automatically displaces it.

Q. So the fresh air on the Flota vessels is induced fresh air?

A. Induced fresh air.

Q. Air which is induced to enter the hold by the partial evacuation of air from the hold, which results in the operation of the exhaust fans?

A. That is correct.

Q. Whereas the system on the Grace Line—

A. —is a forced fresh air in-take, with two 20,000 c.f.m. blowers, port and starboard, on each deck, which is double the capacity of the Flota vessels, plus the fact that the supply, the refrigerated air supply enters each deck from the aft bulkhead and the port and starboard bulkhead, and returns to the forward bulkhead, whereas the refrigerated air on the Flota vessels being either supplied from the port bulkhead or the starboard bulkhead and returned to the other bulkhead, depending upon which bulkhead you were using as supply.

Q. That is only from one to the other?



A. That is correct, plus the fact that we are using conventional stowage on the Grace Line vessels in some areas, two stems standing, in other areas two stems standing and one [fol. 649] horizontal, or one flat, whereas on the Flota vessels we are stowing three high in some areas and three high and a flat, which makes it more difficult for the refrigerated air to penetrate and the exhaust air to be exhausted.

• • • • •

Q. Now, Mr. Friedlander, is it your testimony that economic carriage of bananas on the Flota vessels is feasible only when that space is used by one shipper?

A. And by only one shipper, only feasible under those circumstances because it is very difficult and requires the utmost of time and patience for even one shipper to start to successfully carry bananas on these vessels. It is a constant challenge.

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Vol. X

Friday, November 21, 1958

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JOSE J. BORRERO was recalled, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Giallorenzi:

Q. Mr. Borrero, you have been previously sworn in and you have testified that you are or have been the Acting General Manager of Transportadora Grancolombiana, LTDA., the General Agent in the United States of Flota Mercante Grancolombiana and that you are now the Executive Vice President of Grancolombiana, N. Y., Inc., which is the general agent in the United States and Canada for Flota Mercante; is that correct?

A. Yes; that is correct.

• • • • •

Q. Let us start in 1953. Would that be better for you?

A. I think so. I testified here the other day, I think in answer to Mr. Blackwell, about the agreement that Grancolombiana had had in bananas and I think I came from 1949 to 1953.

Q. That is correct.

A. You want me to start from that point where I left off the other day?

Q. Yes.

A. Well, in accordance with my recollection and some [fol. 650] records, the last shipper of bananas prior to the Colombian company was Haytian, through the company of Miami, who made three shipments and that ended in April, 1953. From that time on we don't have anybody shipping bananas for multiple reasons. The main reason was because nobody wanted the space and, nevertheless, whether they wanted the space or not, at that time we did not have in service from April, let's say,—April, 1953—to November, 1953, the five vessels which we had had for space for bananas, which was required in this particular service.

Q. How many ships did you have with reefer capacity during the period of time in this service?

A. I would say in 1953—We have to bear in mind that the Venezuelan—you can strike that and I will come back to that. Grancolombiana, in April of 1953, was composed or organized by three countries. Venezuela, Colombia and Ecuador. We were using in the service from New York to South America—

Q. Is that the west coast?

A. —namely, from New York to Guayaquil, because that was the end of the run, vessels of Venezuelan flag. Then Venezuela withdrew from Grancolombiana in October, but prior to that time they had started taking those vessels to services connected with Venezuela in anticipation of that separation. You see, they were already moving the vessels to have the vessels in position so that when the separation came about, which was in October, 1953, they already had their services individually organized. Then I would say at that time we only had three vessels, the Ciudad de Quito,

the Ciudad de Medellin and the Ciudad de Manizales. In August, 1953, the company received the Ciudad de Cali and in November, 1953, the Company received the Ciudad de Ibague. Then I would say by December, 1953, the Company had again five vessels in service suitable for transportation of refrigerated cargo.

Then one of the reasons why there were no people interested in utilizing those vessels for the transportation of bananas at that time—let us say from April, 1953 to November, 1953—was because we couldn't offer a vessel a week. You have heard that regularity is a main factor for [fol. 651] success. But then it came 1954, in which we had the five vessels that used to sail from New York every Friday, on a weekly basis, which does not mean that they would come back with the same regularity, on the same day, because this company allows certain margins, you see—certain allowances for adjustment.

Q. Will you describe those adjustments or margins?

A. I will say, Mr. Giallorenzi, that we have, you see, five vessels in that service. You have a frequency of seven days. That means that every vessel has 35 days to make his round and start again. I could say that if a vessel making that round did not encounter any port difficulty or any problem out of the normal that that vessel could be back in 25 days, could be back to the first port north of Hatteras, either Baltimore, Philadelphia or New York, and that will give us ten days, you see, as a margin for the next sailing. If the vessel is OK, she goes back in 25 days; if she has problems, she goes back in 35 days, or even if she could make the trip in 34 days, still you can push the vessel and work overtime and try to sail the vessel on the schedule.

\* \* \* \* \*

Q. Would that occur on many sailings, Mr. Borrero?

A. \* \* \* That is one of the reasons there was no people interested in the space for bananas, the lack of regularity in arrivals here in the States. The whole year 1954 passed by without Grancolombiana carrying a single shipment of bananas. There were prospective parties that either called

on the telephone or wrote a letter or went to see us about this space. They made their criticisms and then walked away.

Q. Mr. Borrero, Mr. Friedlander testified yesterday that if a number of shippers were allowed to load bananas on Grancolombiana's vessels that it would increase the loading and unloading time considerably. I think he said the loading time might go as high as fifty hours and the unloading time would also be appreciably increased. What effect, if any, would that have on Grancolombiana's schedules?

A. Regardless of the word of Mr. Friedlander—he is [fol. 652] right when he says fifty, forty or thirty hours—any appreciable increase in the time that we allow now for this operation I think will cause problems in the fulfillment of the schedules because—especially in Philadelphia, on unloading, you have to stay there more than one day. I don't think we can take it.

Q. Now, Mr. Borrero, referring to Exhibit 15, pages 7 and 8, will you please tell us what is the maximum number of hours you allowed for loading bananas in Guayaquil?

A. In accordance with this contract, we allow them fifteen hours for loading of each vessel.

Q. Do you have the right to sail a vessel if loading is not completed within those fifteen hours?

A. We have the right, yes.

Q. You also have the right to charge them a penalty?

A. Yes.

Q. So that if there were multiple shippers and the loading time would be increased, you would have a right either to charge a hundred dollars per hour over fifteen hours or to sail the vessel directly regardless of how many stems had been loaded; is that correct, in accordance with your contract?

A. In accordance with this contract, yes.

Q. Now, how about unloading? Do you have a maximum number of hours in which they could unload?

A. Yes, sixteen hours.

Q. Where do you find that on Exhibit 15?

A. In the third paragraph.

Q. That is page 8?

A. Page 8, yes.

Q. And do you have the right to sail the vessel if they do not complete unloading within that period of time?

A. I think we have. I can read here and confirm my thinking.

Mr. Kharasch: I think we had some question about this contract earlier in the hearing and the ruling was that the contract was clear enough to speak for itself.

Mr. Kurrus: It's been speaking.

By Mr. Giallorenzi:

Q. I want to know now if—

A. Yes, it is in here.

“Should the Lessee not start full and normal unloading operations within the time assigned for this purpose or should same be commenced and not finished [fol. 653] within six hours after the expiration of the sixteen hour time allowed to lessee to effect the unloading of the bananas, Grancolombiana, at its sole discretion, shall have the right to sail the vessel from Philadelphia or other discharging point with the bananas on board.”

Q. With the bananas on board?

A. Yes.

Q. Now if the problem of unloading was increased by a number of shippers, as Mr. Friedlander testified, and the unloading time was greatly enlarged, would Grancolombiana sail the vessels with bananas on board?

A. Well, that is a hypothetical question because, you see, you may be able to stay or you may have to be forced to get out because you have to fulfill the schedules in other ports.

Q. And if you had a contract with a number of shippers, would you insist upon such a clause for loading and unloading?

A. We have to insist on a clause that puts a limit on and that limit has to be within our needs.

Q. And your needs are fifteen hours, I take it, for loading and sixteen hours for discharging?

A. Yes. We can't allow more time for this operation.

Q. And that is necessary so that you can insure the Friday sailing from New York?

A. That is correct.

Q. Incidentally, what part in the revenue of Grancolumbiana does the southbound cargo play? Is it an important part of your revenue?

A. In comparing the northbound and southbound movements, the southbound movement is greater.

Q. Revenue-wise and tonnagewise?

A. Yes.

Q. Is it necessary, then, on your southbound cargo movements to have a specific date for sailing?

A. Definitely. You are dealing here with hundreds of interested parties that require the preparation of documents and papers, the ordering of cargo to the docks and they need a regular, dependable service.

[fol. 654]

Vol. XI

Monday, November 24, 1958

JACK FRIEDLANDER resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

Cross examination.

By Mr. Kharasch:

Q. Mr. Friedlander, as I understand it, you now have the title of general manager? Is that right?

A. That is correct.

Q. And general manager of what company, please?

A. General manager of the Ecuadorian Fruit Import Corporation.

Q. Would you please tell us what the business of the Ecuadorian Fruit Import Corporation is?

A. The business of Ecuadorian Fruit Import Corporation is to purchase bananas from Ecuador.

Does the Ecuadorian Fruit Import Corporation actually have an office in Ecuador for the purchase of fruit?

A. No, we do not have an office in Ecuador for the purchase of fruit. Since it is generally accepted good business practice to do business with a company that originates in Ecuador, we have a company in Ecuador— There is a company in Ecuador that we have established—

Q. What is the name of that company?

Examiner Robinson: Can you raise your voice?

The Witness: Exportadora de Productos Ecuatorianos, S. A.

By Mr. Kharasch:

Q. When you say "we have a company in Ecuador," whom do you mean by "we"?

A. I mean that I'm an employee of a company that is established in Ecuador by that name. I'm what they call "apoderado," which is the equivalent of the general manager in the United States.

Mr. Palitz: A-p-o-d-e-r-a-d-o. It means in English "power of attorney."

The Witness: I'm general manager.

\* \* \* \* \*

[fol. 656] Q. And this contract was assigned to them by Messrs. Morey and Staff?

A. Was assigned to them Exportadora de Productos Ecuatorianos.

Q. Where did Exportadora—

Mr. Rosenzweig: If I may, I think at this point I'll make the observation that the contract, each contract—now, you referred to the present contract—that the present contract

will speak for itself as to the parties between whom it was concluded.

Mr. Kharasch: Yes, but I'm not clear on: Is that the first contract that gave Messrs. Morey and Staff the right to assign the contract to an Ecuadorian corporation to be formed? But I think Mr. Friedlander has just supplied the missing link. The Ecuadorian corporation apparently then assigned it to Panama Ecuador Shipping Corporation.

By Mr. Kharasch:

Q. Is that right?

A. That is correct.

Q. Now, Mr. Friedlander, will you look at Exhibit 71, which is a bill of lading, and would you look on the line where it says "Shipper"? The shipper is spoken of as Agricola San Vicente, S. A. Would you tell us who Agricola San Vicente is?

A. Agricola San Vicente is a corporation that exists in Guayaquil that buys fruit and loads the fruit on vessels and acts as the agent for Exportadora de Productos Ecuatorianos.

Examiner Robinson: Let's pinpoint just a little bit here at this stage. What would be your reaction to renting these stages if you thought it would help, assuming you had to share the space with someone else?

The Witness: I give you the particular problem in Puna where we load the Grace. The same pontoon that carries our staging equipment also carries the stevedores. So we take our stages out to the ship, we take them back to Guayaquil with the stevedores instead of waiting for Naboia to finish loading. But there wouldn't be any particular problem with the stages if the shippers wanted to cooperate.

Examiner Robinson: No, my point is: I said let's localize it. What would be your reaction? Would you mind doing it? Would you have any objection—

[fol. 657] The Witness: I would have objection to doing it with certain shippers, Mr. Robinson.



Examiner Robinson: Only with certain shippers?

The Witness: Yes.

Examiner Robinson: I'm not asking you which ones. I'm not interested in that.

The Witness: Yes. I wouldn't want to share with certain shippers.

By Mr. Blackwell:

Q. May I follow that up? Why?

A. There are personalities involved.

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Vol. XIII

Monday, December 1, 1958

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Cross examination (Resumed).

• • • • •

By Mr. Blackwell:

Q. And the loading of the vessel in the aggregate, Mr. Friedlander, how much additional time did you say it would take? Is it seven to 12 hours for three shippers?

A. That's correct, Mr. Blackwell.

Q. And is that assuming friendly or unfriendly shippers?

A. I'm assuming where they will use the same stages and use the same equipment, do everything but commingle their fruit in the same bins.

Examiner Robinson: Is this a good time for a break?

Mr. Blackwell: Yes, it is.

(Whereupon, a recess was taken.)

By Mr. Blackwell:

Q. Mr. Friedlander, one of the chief reasons, if I correctly interpret your testimony, for having just one shipper on the Grancolombiana vessels, one banana shipper that is, is that when one shipper is loading the entire hold and the

operation, the loading operation, at any particular stage starts to slow down, that shipper can divert some fruit to other portions of the ship at approximately the same loading rate in the area that's being loaded. Is that correct?

A. That's correct.

[fol. 658] Q. Now, assuming three shippers on the Grancolombiana vessels, to a large extent wouldn't that also be possible if three shippers were given space on the vessel? To some extent at least wouldn't it be possible for them to load bananas into other areas or other holds or levels of the ship when the loading started to slacken off in a particular area of the vessel?

A. To some extent, yes, Mr. Blackwell.

Q. That's all I have.

Examiner Robinson: Well, that would depend—now, let's carry it to extremes—that would depend, of course, wouldn't it—or would it? I don't know what the answer is—as to who owns the staging?

The Witness: Well, I'm assuming that everybody worked together with the same staging.

Examiner Robinson: The optimum—

The Witness: Optimum cooperation and good will.

Redirect examination.

By Mr. Rosenzweig:

Q. Would that do it to any considerable extent?

A. No, a slight extent.

Q. And isn't it a fact that so long as each shipper is to have his own side port to work you cannot at any one time have three shippers working aboard the vessel?

A. No, you could have two shippers working aboard the vessel at any one given time but never three.

Q. But never three?

A. That's correct.

Q. So that if the three hypothetical shippers were each to have one deck there could never then be under those circumstances a situation in which all of the decks were being worked at the same time?

A. It would be impossible.

Q. Now, would you ever consent to have your fruit brought in at the same time through the same side port as another shipper?

A. It's impossible. It just doesn't work.

Q. And, in fact, you have great difficulties with your stevedores even now when you have the whole run of the ship?

A. That is correct.

\* \* \* \* \*

[fol. 660] FRANK VISCONTI was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rosenzweig:

Q. Mr. Visconti, will you please tell us what is your occupation?

A. I am an engineer. I am presently president of Alex C. Patterson and Sons, in New York City. We are mechanical contractors and engineers.

\* \* \* \* \*

Q. Now, Mr. Visconti, are you familiar with the Flota vessels?

A. Yes.

Q. How far back does your familiarity with these vessels go?

A. Well, they actually start with the first shipment of bananas from Guayaquil. I flew down to Ecuador and came back with the first ship in order to survey and analyze the feasibility of carrying bananas on a ship; and also to observe what possibly could have been done wrong, because the reputation at the time for the shipping company in carrying bananas was very poor.

\* \* \* \* \*

Q. And does your familiarity extend to the new Flota vessels as well?

A. Yes, they did. Approximately six or seven months [fol. 661] ago I also flew to Ecuador and came back on the latest type of Flota ship, the TUNA, to observe the latest in equipment and schemes that were installed on the ship and to vary, if necessary, the operating instructions in accordance with the new type of ship.

Q. Now, you were engaged by Panama Ecuador to do this?

A. Yes, on a part-time basis.

Q. And did your employment on behalf of Panama Ecuador require you to attend the vessels on arrival?

A. Yes, I do. I attend almost every unloading in Philadelphia on the Flota ships; and I did attend when first the Grace Line's operation was started, the unloading there.

Q. And could you estimate how many unloadings of Flota vessels you have attended?

A. Exactly 107.

\* \* \* \* \*

By Mr. Dougherty:

Q. If you know, were the Flota ships built as banana carriers or designed to be banana carriers?

A. I know they were designed to carry bananas, but whether they are banana carriers such as you would have on the latest United Fruit ships or the Grace Line ships, that is another question. They carry bananas but a limited amount; and more important than that, the personnel factor is very important.

I think the engineers on the Flota ships are very competent, but they in many cases have never had experience. We have to actually sit, like I do, before—if a new ship comes up, like the future CIUDAD DE GUAYAQUIL, a new ship coming up now and it will go South and pick up some bananas, the chief engineer has never carried bananas. He has some conception of refrigeration, but the application and instructing him how to do this, how to turn this damper, why, and give him a history of bananas

and their care, that has to be done. And then after the chief has done a number of these trips, he usually becomes pretty competent. But you always—it is important to check with him because if it wasn't important, I certainly wouldn't go down to Philadelphia.

Q. What I had in mind was I understand, for example, the United Fruit ships are built exclusively as banana carriers; that is, refrigerated ships designed exclusively for [fol. 662] carriage of bananas.

A. Yes. Gibbs and Cox.

Q. And the Grace Line's ships are designed exclusively as carriers of bananas, are they not?

A. I think—yes, I would say they are.

Q. But that is not true of the Flota ships?

Mr. Lippman: Well now, I am going to object to that question. I think he has answered the question.

Examiner Robinson: If he knows. But if he doesn't know, all he has to do is say so.

The Witness: I don't think so, that the Grancolombiana ships are designed as primarily banana carriers, because there are a number of physical characteristics in the vessel that should have been more considered. Like the opening of the side port; on the new ships, the TUNA, in the TUNA class, that opening is so small, when there is a mean high tide or a mean low tide in the Delaware in Philadelphia, you can't run through out of the conveyer. And I remember speaking to Mr. Friedlander when he went to Germany to try to incorporate as many features in these vessels that would be more applicable to carry bananas; one of the things we stressed was a larger side port. Of course we couldn't have that changed. The bin locations. The size of the hatches. The size of the plugs.

I doubt if any other banana carrier has to contend with those physical problems.

For instance, on the MANIZALES, which is the first ship I sailed and consequently got very interested in it, the plugs weighed 400 to 500 pounds. And those things had to be lifted off every time you go into the hold. That type of ship, that class of ship is very, very bad to check over while

in transit. This tremendous plug had to be lifted out by four or five men, and you had to sneak into the hold that way.

. . . . .

[fol. 663]

Vol. XV

Thursday, December 4, 1958

. . . . .

JOSE J. BORRERO was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Cross examination.

By Mr. Kharasch:

Q. Mr. Borrero, I think in your direct testimony, you made the statement that Grancolombiana did not want to see any appreciable delay in its sailings.

What did you mean when you used the word "appreciable," matter of days? Matter of hours?

A. I don't think that I said the word "appreciable." What I tried to convey was that any delay that may interfere with the fulfillment of our schedule would be something that the company couldn't entertain.

Q. Your round trip now takes approximately thirty-five days, is that right?

A. From sailing to sailing, forty-two days.

Q. Forty-two days?

A. From sailing to sailing.

Q. Is that the same for the new class of ships as for the IBAGUE? The IBAGUE has the same speed?

A. No.

Q. The IBAGUE is slower?

A. Yes.

Q. You will receive a new ship to replace the IBAGUE?

A. There is a new ship coming, yes.

Q. When is that arriving?

A. I think by sometime in January, beginning of February.

Q. That will be of some assistance in keeping your schedules, won't it?

A. The company will do its best.

Mr. Rosenzweig: You said the company is planning to put—

The Witness: Planning to put the GUAYAQUIL—that is the name of the new vessel—in place of the IBAGUE.

By Mr. Kharasch:

Q. And since that will be a faster ship, it will assist you in your schedule keeping, will it not?

A. No. This is not the purpose, because the IBAGUE is [fol. 664] keeping the schedule. These two vessels are the same class, you see, same itinerary.

Q. You will then have six ships, all of the same class with the same speed; whereas you now have five faster ships and one a little bit slower?

A. That's right.

Q. Would a delay of three hours be such a delay in a forty-two-day turnaround that the company could not handle it?

A. It may be.

Q. Would a delay of two hours be such a delay?

A. It may be.

Q. One hour?

A. It may be.

Q. Ten minutes?

A. You see, Mr. Kharasch, it all depends on the way you are taking, the method. One delay of one hour, you may lose the working time in the next port of call, because the Port of New York do not work twenty-four hours a day at the same rate. You have to order men in advance for the working operations.

Q. On the other hand, a delay of one, two, or three, or four hours may not have any significance at all, because the ship might be arriving at midnight at some port?

A. May be.

Q. And you might have the time until morning, is that right?

A. May be. A delay of one hour can make you lose passing of the Panama Canal. That means one day's delay of the vessel.

Q. I think you explained that since the itinerary was extended on the service we are speaking of to include Peru, you have more flexibility in adjusting your schedule by sometimes skipping a Peruvian port, is that right?

A. You may be able to, sometimes, depending on the amount of cargo that you carry for those ports that you may be able to take.

Q. And you use that device now to keep your ships on schedule?

A. I will say we use that device now, but that is something I mentioned, something that exceeds that possibility. Of course, it is not a good practice to do so, because you have the traffic, you have the trade.

\* \* \* \* \*

By Mr. Kurrus:

Q. Why did you publish this advertisement in 1955 offering your refrigerated space for the carriage of bananas from Ecuador? Do you recall?

A. Yes—

Q. In June of 1955, that is Exhibit 7.

A. Well, I think that I said in here that there was a time when we have put two of these refrigerated vessels to carry fish in the West Coast service, Vancouver-San Francisco; and that later when there was what we consider a firm prospectus, people interested in the space, the company decided to let know that we were interested in offering contracting the space if anybody was interested in it.

Q. Were you part of the discussions that entered into the decision to publish this newspaper notice?

A. I don't recall part of the discussion, because at that time I was not manager of Grancolombiana; I was operating manager, you see.



Q. In the United States?

A. Yes, here in the United States.

Q. Was this advertisement drafted after the advice of counsel?

A. I think so.

Q. Do you recall whether at that time you had considered the decision of the Federal Maritime Board in the case of Mr. Consolo against the Grace Line?

A. Well, as I said before, I was not in the discussion, where to put the advertisement or not to put the advertisement, you see. I know the advertisement was put by the company, that I know.

Q. And it was put in after the advice of counsel?

A. I think so.

Q. Why didn't you publish the same type of a notice when the initial contract to Messrs. Morey and Staff—

A. Maybe we considered it not necessary. The fact the advertisement was not put in that date in which you are indicating, I don't know why it wasn't put.

Mr. Dougherty: Your answer is that you don't know?

The Witness: I mean we didn't put the advertisement, you see.

By Mr. Kurrus:

Q. Do you recall whether there was any discussion whether you would put the advertisement in the paper?

A. No, I don't.

Mr. Dougherty: Now, there, is your answer that you don't recall?

[fol. 666] The Witness: What?

Mr. Dougherty: Is your answer there that you don't recall?

The Witness: I don't think so, there was any discussion; I don't recall any.

I mean at this very moment, I don't know why it wasn't put or why it was put.

By Mr. Kurrus:

Q. Do you consider the Grancolombiana Line offers a good and regular service in this trade at the present time?

A. Yes, I have to.

Q. It is true, isn't it, that this service has improved greatly since 1955?

A. Insofar as keeping the schedule?

Q. Insofar as your regularity, frequency, and your operating ability is concerned.

A. It has always been improving, but I would say the greatest improvement has been lately, you see, in that we have been able to put there the larger vessel and the faster vessel.

Q. Would you say that your service with respect to the carriage of bananas has undergone a substantial improvement since 1955?

A. In the latest week, yes.

Q. Excuse me?

A. In the last week or latest weeks, two months maybe.

Q. Would you say it has improved since 1955?

A. No. I mean—just a minute, has improved, of course, in comparison with 1955, but that doesn't mean in 1955, June, or end of 1955, there was an improvement. See, the improvement has been lately in these last months.

Q. But there has been a constant improvement over the period?

A. Well, the improvement came in when we have better tonnage, better vessels, you see. These—

Q. I see.

A. These vessels have come gradually, not at the same time, the five vessels, you see. They change—one in 1957 it was, and then three months later another, and so forth.

Q. Has your service between 1955 to date, for the carriage of bananas this is, been substantially better than whatever service you had for the carriage of bananas, let's say, in 1953?

A. Well, in 1953, we didn't have—we didn't have—I have [fol. 667] some dates in here, you see. It is difficult from memory.

Q. You can consult anything you want.

A. In 1953, we didn't have I think the whole five vessels there.

Q. Let me refresh your memory. You recall that you carried bananas one time for a company, Fruiterus Food Americana?

A. I don't remember that company.

Q. Do you recall your company carried bananas for Standard Fruit Company?

A. Luis Neboa, yes, the name of the man was.

Q. But they were shipped for Standard Fruit Company?

A. I think so, yes.

Q. You recall you had certain difficulties at that time with respect to the carriage of bananas?

A. I think I can answer you the question this way, Mr. Kurrus, we only have two vessels, only one vessel; I mean the shipment was every fifteen days or every three weeks. Only in 1953, we were able to offer five vessels, I mean a weekly service northbound for this particular purpose.

Later on, in view of there were no takers for the vessels, the company sent two or three of these vessels to the West Coast in 1954—excuse me, 1954, we have the five vessels there. There were no takers for it. It was at the end of 1954 that the company sent the CIUDAD DE QUITO, CIUDAD DE CALI, and I think the other one was MANI- ZALES, to the West Coast. When the company made the agreement with Mr. Staff and Mr. Morey, the company brought the vessel back from the West Coast, so that we could have five vessels in the run.

This same service we were able to offer at that time was the same in 1955 or 1956; and only when we received the new vessel in 1957, we could start improving the service.

Q. You didn't have much banana service, prior to 1955 was it? It wasn't very reliable?

A. I think I mentioned here all the agreement we had at that time.

Q. What is the difference in speed between your new ships and your old ships?

A. About 3 knots?  $2\frac{1}{2}$  or 3.

\* \* \* \* \*

[fol. 668] Q. When you spoke to Mr. Tibbett in September of 1957, do you recall whether you told him that if the Board required you to be a common carrier that you would make an effort to accommodate more than one shipper?

A. No, I don't recall precisely those words or anything of that sort.

Q. Did you say nothing to that effect, do you recall?

A. No. When I approached Mr. Tibbett, it was to get from him a direction where to go, what to do.

Q. But did you indicate to Mr. Tibbett that you were prepared to go anywhere? In other words, if the Board said to you, "Mr. Grancolombiana, you are going to have to accommodate more than one shipper," did you tell Mr. Tibbett, "Well, at that time we will attempt to accommodate more than one shipper"?

A. I don't remember, Mr. Kurrus. It would be unfair for me to say yes or no. I don't remember.

Q. You don't remember?

A. I don't remember.

\* \* \* \* \*

Q. No. Who decided to come down to the Board? I don't take Mr. Tibbett and single him out.

A. Why we decided to come to the Maritime Board with the problem?

Q. Who decided, your attorney or you?

A. I would say the management of Flota.

Q. I see. Did you come down with your attorney?

A. Yes, with Mr. Giallorenzi.

Q. Do you operate a service similar to Grace Line's?

A. Similar in what respect?

Q. Similar with respect to the carriage of northbound commodities. Would you say that your service is similar to Grace Line's service from the west coast of South America, other than the fact that they go down to Chile?

A. They have also passenger service, you see.

Q. But would you say that their freight service is similar to your service, that you operate in a similar way?

Examiner Robinson: Just in general.

A. Yes, I think so, yes.

[fol. 669] Q. Do they solicit coffee just like you do?

A. Yes. Very successfully, too.

Q. You are competitive with them in solicitations of coffee?

A. Yes.

Q. And they generally carry the same commodities north-bound from Colombia and Ecuador as you do?

A. Yes.

Q. They don't carry any additional commodities that you don't carry, and it is unlikely that you would carry commodities that they don't carry. Isn't that true?

A. They may, because they call farther south than we do.

Q. I understand that, but with respect to the operation from Colombia and Ecuador.

A. No, because the main commodity from Colombia is coffee.

Q. No, and I understand that there is also wood, cocoa, frozen shrimp, and some other stuff like that.

A. Yes.

\* \* \* \* \*

By Mr. Rosenzweig:

\* \* \* \* \*

Q. Now, when you stated that the service had improved, did you mean by that that the arrivals at the Port of Philadelphia were more regular than heretofore?

A. Right.

Q. You did not mean, did you, that the vessels were now making the transit from Guayaquil to Philadelphia in less time than heretofore, did you?

A. No.

Q. And in fact they do not?

A. What?

Q. In fact they do not make that transit in less time?

A. No.

Q. Through the vessels which are presently in service, with the exception of the IBAGUE, are faster than the vessels which were formerly in the service, you utilize that ex-

cess speed of the vessels to make a longer stay at Buena-ventura, do you not?

A. Right.

Q. So that the transit time from Guayaquil to Philadelphia is still 12 days for the most part?

A. Eleven days.

Q. Which is it, 11 or 12 days?

A. Eleven days, I think.

[fol. 670] Q. The contract permits you 12 days?

A. A maximum of 12 days.

Q. And the additional speed of the vessels is also utilized southbound to go to the Port of Ilo in Peru and other ports which formerly you were unable to service with the slower speed vessels?

A. Yes.

Q. So that from the viewpoint of the banana shipper the additional speed of the new vessels is not a significant factor?

A. No.

\* \* \* \* \*

[fol. 671]

# BEFORE THE FEDERAL MARITIME BOARD

## Transcript of Proceedings (Excerpts)—May 9, 1960

Vol. XVI

Room 705

45 Broadway

New York, New York

\* \* \* \* \*

MAX BOYARSKY resumed and testified further as follows:

Redirect examination.

By Mr. Kharasch:

\* \* \* \* \*

Q. Mr. Boyarsky, would you take Exhibit 111 and put it in front of you?

A. Yes.

Q. Would you, column by column, indicate what assumptions if any you made as to the data appearing in each column?

A. I could generally describe what the procedure was and what assumptions I had to make. I think it would be easier to do that than column by column.

Q. All right, sir.

A. I was given certain documents, which were the loading sheets indicating the number of stems loaded and the price paid for the bananas in Ecuador, containing information showing who the bananas were bought from, ship's name, and when the ship sailed from Ecuador.

I was given what were described to me as out-turn sheets, indicating the number of stems which were out-turned or disposed of from the shipment which were previously—which I previously mentioned as a loading sheet; and I was given certain documents which were described as liquidation sheets, showing the monies received on liquidation from the sale of these bananas.

I used the assumption that these were documents which were valid documents, and I used these documents in compiling my summaries.

I did not, as I indicated to Mr. Giallorenzi, I did not, in any way, attempt to confirm the authenticity of the documents. I did not undertake other procedures which I would have undertaken if I were asked, for example, to conduct a complete certified public accountant's examination of the things.

[fol. 672] — There are certain accepted procedures that any accountant would use that, of course, would have to depend on the job he was performing and would depend on the circumstances surrounding the particular order.

As far as I was concerned, this was a job that, very simply stated, was to take certain documents, accept those documents for what they were, and from those documents make statistical summaries and present them. That is just what I did.

\* \* \* \* \*

SHILLO ADIR was called as a witness, and having been previously duly sworn, was examined and testified as follows:

### Examination.

By Mr. Kharasch:

\* \* \* \* \*

Q. All right, sir.

Will you then look at this other file again, where we have out-turn sheets for Banana Distributors and liquidation sheets for banana distributors; would you look through those and state whether or not they were prepared by your company?

A. Yes, they were.

Some of these earlier ones were prepared by some others, which was a period of six months, which were commissioned agents for the Dover Banana; National Banana, Inc., I think, was doing business in March of 1959, came about through Banana Distributors and R. Dixon & Co. joining in the National Banana, sold the fruit for the clients they had at the period they joined them. That continued about until September of 1959.

\* \* \* \* \*

Mr. Kharasch: Mr. Examiner, at this time I would like to move the admission of Exhibits 41, 42, 43, 44, marked for identification at the previous hearing, and Exhibits 107, 108, 109, 110, 111, 112, 113, and 114 for identification marked at this hearing; and I would like to inquire—I am not sure—I believe Exhibit 22, the Ecuadoran conversion rate was already received. Is that right, sir?  
[fol. 673] Examiner Robinson: Yes.

Mr. Kharasch: I ask that these exhibits be received.

Mr. Giallorenzi: I object to any and all of the exhibits which have to do with computation of damages, on the grounds that they do not truly reflect what damages, if any, Mr. Consolo, the complainant, suffered.

They are based upon apparent sales made by other companies and not Mr. Consolo's himself. They are based on



so-called profits before stevedoring and freight on Grace Line vessels and then they attempt to convert it, to cover the Grancolombiana vessels.

There is absolutely no proof in my opinion that one-third of the damages as set forth in these exhibits are proper. It is merely a picture taken out of the air.

For those reasons, I strongly resist the introduction into evidence of all of those documents.

Examiner Robinson: You refer to these exhibits as to their weakness and not to their relevancy, so I will receive them, and you attack them any way you deem fit.

(The documents heretofore marked for identification as Exhibits Nos. 41, 42, 43, 44, 107, 108, 109, 110, 111, 112, 113 and 114, were received in evidence.)

\* \* \* \* \*

LOUIS F. MEYER resumed and testified further as follows:

Direct examination.

By Mr. Lippman:

Q. Mr. Meyer, you have previously testified in this proceeding, I believe in November of 1958?

A. That is right.

Q. Do you recall, sir?

A. Yes.

[fol. 674] Q. And you testified at that time that your company, A. R. Dixon & Co., was acting as commission agent for the sale of the bananas imported by Mr. Consolo on the Grace Line, is that correct?

A. Correct.

Q. Now, did you hear the testimony of Mr. Adir a few moments ago with respect to an arrangement whereby a new company was formed?

A. Yes.

Q. And what was that company?

A. The National Banana Company.

Q. Now, prior to the organization of the National Banana Company, did A. R. Dixon & Co. continue to act as Mr. Consolo's agent?

A. That is right.

Q. From the period of November 1958 through March of 1959?

A. That is right.

Q. And then, in March of 1959, National Banana Distributors was organized?

A. That is right.

Q. Did the organization of National Banana Distributors affect in any way your job of selling Mr. Consolo's bananas?

A. No.

Q. Did you continue in that capacity up through September of 1959?

A. That is right.

Q. So that, during the period from October 1957, when A. R. Dixon & Co. first started to represent Mr. Consolo, through September of 1959, A. R. Dixon & Co. and National Banana Distributors sold all the bananas imported by Mr. Consolo on the Grace Line ships; is that correct, sir?

A. That is right.

Q. Now, did the organization of National Banana affect in any way your ability to sell Mr. Consolo's bananas?

Mr. Giallorenzi: I object to this.

Examiner Robinson: It is a direct question. I don't see why he can't ask it of him.

Mr. Giallorenzi: I don't see the relevancy of it. I think it is irrelevant.

Examiner Robinson: What do you have in mind?

Mr. Lippman: I just want, in the interest of continuity, Mr. Examiner,—

[fol. 675] Mr. Giallorenzi: I withdraw the objection.

A. No, it didn't interfere.

Q. Now, during the period of November 1958 up to September of 1959, could you have sold for Mr. Consolo's ac-

count up to an additional ten to twelve thousand stems each week?

A. Definitely.

Q. And at what prices could that amount of bananas have been sold?

Mr. Giallorenzi: I object to this. This is very, very speculative, what prices they would be sold at, because certainly 12,500 additional stems in the market might mean a downward trend in the prices. It depends upon what the other fruit companies were bringing in, what the conditions of the market itself was here, how many bananas were being exported by the other companies; and I don't think that Mr. Meyer, with all his experience in the banana business, is that good a witness.

Examiner Robinson: You may cross examine him in due time and try to bring out any weaknesses which you hope to find. There is nothing wrong with the inquiry.

Mr. Giallorenzi: How could he testify, at this late date, at what he could have sold it, Mr. Examiner?

Examiner Robinson: You may answer the question.

A. Repeat the question, please.

(The last question was read by the reporter.)

A. The current market prices prevailing at that time.

\* \* \* \* \*

Q. Do you consider yourself in competition with United Fruit and Standard Fruit, in respect to these customers who do not buy from you regularly?

A. Yes.

\* \* \* \* \*

Q. And did you, at times, sell to customers of Messrs. Morey and Staff.

Mr. Dougherty: I think the time has come when we have to object to this line of testimony.

[fol. 676] What is being attempted is an effort to repair deficiencies in Mr. Meyer's earlier testimony, under the guise of bringing the case up to date.

At the earlier hearing, Mr. Meyer testified explicitly that he was not in competition with Panama-Ecuador, which is the concern that has just been referred to. When the reparations feature was severed; if I remember the testimony correctly, we were told by counsel there was a possible witness from Banana Distributors only. A little bit more on the issue of reparations, one fragment that has not come along—and I don't think that leaves the way open for a complete recasting of the testimony in an effort to salvage the case.

Mr. Lippman: I object to Mr. Dougherty's characterization of what we are attempting to do. We are merely attempting to complete a record which had certain ambiguities in it, and I think it is proper for this witness, now that he is here and available, in bringing the record up to date, in speaking of the entire reparations period, to describe just what his relationship was during that period with other people doing the same thing that he was doing.

Mr. Dougherty: Mr. Examiner, he described that at the first meeting quite explicitly; and what has occurred in the meantime is that there has been a realization that his testimony would not support the claim.

What is being attempted now is to repair the testimony under the guise of bringing it up as a mere fragment, by redoing in its entirety the whole general subject that Mr. Meyer testified to, and that was elaborately covered in his cross examination in the first hearings.

Examiner Robinson: Mr. Dougherty, if you feel there is any inconsistency, on cross examination you can confront the witness with what his testimony was in the record and see what you can get out of that.

Mr. Dougherty: I think it goes a little bit more to the weight afforded to the testimony. It involves the witness impeaching himself under the sponsorship of counsel.

Mr. Lippman: If it will help counsel any to amend my question, to confine it to the post-hearing period, namely, the period from November 1958 up until September—

[fol. 677] Mr. Dougherty: I don't consider that as a satisfactory solution, Mr. Examiner.

Examiner Robinson: Go ahead. You do what you want to tear that down to the proper limits. I have no objection.

I don't believe, in administering a hearing, in standing too much on certain— "You said that and you can't say that as of a given time."

I am trying to get a record, and it is not personal when I say this—I am not too much concerned, so long as you are not hurt judicially.

Mr. Dougherty: I understand. We are being hurt.

Mr. Lippman: You understand, Mr. Examiner, we are getting some facts and I don't think it should be precluded in bringing everything out.

Mr. Giallorenzi: We are being seriously prejudiced by this ruling, Mr. Examiner.

Examiner Robinson: I don't see that.

Mr. Giallorenzi: We brought it up in our briefs which were filed with the Maritime Board and yourself in this matter, and they noted there was this deficiency in their proof, and here, they are trying to salvage it.

In fact, when I objected to the supplemental complaint being tacked on to this hearing, one of the reasons which I stressed was that they were using this additional hearing for an additional supplemental complaint as a guise to fill in the gaps which they, themselves, have shown in their case.

The reply that I got to that statement which I made was for me to elaborate on it.

But this is the very proof of what I tried to bring out several months ago, that this supplemental complaint was nothing other than a device to get this evidence in, which they are doing this very day. And I would have been very, very happy to start an entirely new proceeding on the supplemental complaint alone, but they chose to do it this way, and I knew this was going to happen. Mr. Dougherty [fol. 678] knew it was going to happen. And that is why I vigorously oppose the supplementary complaint at this time, because I knew they were going to get their foot in, to salvage this case.

This is not unimportant testimony. If it were, I would agree with you readily that in an administrative proceeding of this type, we should have all the testimony in.

It goes to the very heart of the defense of our case and to allow this is very, very damaging and prejudicial to Grancolombiana, because there is specific testimony given by this gentleman at the prior hearing, and now he is directing, correcting, his own witness, and I don't think, whether it is an administrative hearing or a hearing before the Court, that they should be allowed to impeach their own witness.

Because, if this thing goes on, well then, the harm that could occur, not only in this case, but in every other case, is—I don't know how to express myself, but it would be tremendous, and I think that the time has come where we have to object vigorously to this attempt to repair their case.

And I may say that in that regard, we brought it out in our briefs and they saw it, they were educated to the lack of proof that they had.

Mr. Dougherty is responsible for that. He was the one that brought the point to my attention. And now they are trying to repair the damage which I believe cannot be repaired. We don't think that this testimony should be allowed to go in.

Just to show what an afterthought it is, let me read from Page 879:

"Examiner Robinson: How much would you have on your reparations, Mr. Kharasch?"

"Mr. Kharasch: Not very much more, Mr. Robinson."

"Examiner Robinson: What do you mean by 'not very much more'?"

"Mr. Kharasch: Very briefly. A witness, very briefly, and possibly some additional examination of someone from Banana Distributors, which was at one time Mr. Consolo's selling agent."

Mr. Kharasch, on Page 894, stated the following:

[fol. 679] "Mr. Examiner, at this point we have concluded our case on the issue of common carriage. We do have, as I said, a little bit more on the issue of reparations."

Mr. Kharasch again, on Page 834: "One more point on the record. You want to be clear that our evidence is in now on the reparations except for one fragment that has not come along. We are not forgoing our evidence in any way, we are just suggesting that the quick procedure . . ."

Now, I don't think that this is a fragment. I think this goes to the very heart of their evidence. I could see Mr. Boyarsky getting on the stand and bringing the computations up to date. That is understandable.

But bringing witnesses in to correct testimony they have given is certainly not a fragment. The record indicates that this is an afterthought. They gleaned it from our briefs. They said: "We will have to correct it." One of the ways they sought to correct it was under the guise of a supplemental complaint.

I objected to it because I knew we were going to have this type of testimony on this very day, and I am glad to see I have been borne out. After they read our brief and knew what their efficiency was, now they are trying to repair it by impeaching their witness.

I think it is improper.

Examiner Robinson: The objection is overruled. Will you ask the question again?

By Mr. Lippman:

Q. I will rephrase the question.

Mr. Giallorenzi: May we have a continuing objection to all this?

Examiner Robinson: You are protected. The rules provide for that.

Q. Mr. Meyer, confining your attention to the period subsequent to November 1953, did you have occasion, during the period of November 1958 up until September 1959,

to solicit and at times to sell to certain customers who purchased their bananas from Ecuadoran Fruit?

A. I sold to some of their so-called customers, yes.

[fol. 680] Q. And did some of your customers also have occasion to buy some of their requirements from Ecuadoran Fruit, to your knowledge?

A. I think so, yes.

SHILLO ADIR resumed and testified further as follows:

Direct examination.

By Mr. Kharasch:

Q. \* \* \* Mr. Adir, does it also help in your banana sales to have more frequent arrivals?

A. Multiple arrivals in a period of a week are helpful.

Q. Why is that, sir?

A. Bananas have a ripening schedule and large jobbers, anyone who buys more than one load a week, would prefer to buy the second load and all additional loads on subsequent days, so he doesn't have to load his inventory at one time, which causes additional shipping damage, additional expense to him.

The more bananas you can give him spread over the week, the better it is for him.

It is easier to sell them.

Cross examination.

By Mr. Giallorenzi:

Q. And that leads me to a point where you testified earlier that the more sales you have, the stronger you are in the trade, and the better prices you can obtain. Isn't that correct?

A. Yes.



[fol. 691]

## BEFORE THE FEDERAL MARITIME BOARD

## ORAL ARGUMENT

Vol. I

Room 4519  
GAO Building  
Washington, D. C.

\* \* \* \* \*

**Transcript of Proceedings (Excerpts)—October 24, 1962**

Chairman Stakem: Come to order, please.

The Federal Maritime Commission has scheduled at this time oral argument for reconsideration of reparation upon the existing record in Docket No. 827 (Sub. No. 1), *Philip R. Consolo v. Flota Mercante Grancolombiana, S. A.*

Who appears for the Complainant?

Mr. Kharasch: Robert N. Kharasch, William J. Lippman and Amy Scupi, 1824 R Street, Northwest, Washington, D. C.

Chairman Stakem: Who appears for the respondent?

Mr. Boyer: J. Alton Boyer, of 529 Commonwealth Building.

Chairman Stakem: Time may be reserved for rebuttal. I might add that the Commission has been generous in the allocating of time and we have allotted forty five minutes to each side.

Mr. Kharasch, you may proceed.

\* \* \* \* \*

Chairman Stakem: Mr. Kharasch, is your client still a shipper on Flota's vessels?

Mr. Kharasch: He was a shipper from 1959 to 1961—he is still a shipper on the Grace Line but he does not now ship by Flota, from 1961 on.

[fol. 692] Chairman Stakem: When did he first move on to Flota's vessels—you say it was 1959?

Mr. Kharasch: Nineteen fifty nine.

Chairman Stakem: September 1959 and when did he cease shipping via Flota—was that 1961?

Mr. Kharasch: Nineteen sixty one, September 1961.

Chairman Stakem: September 1961, thank you.

Mr. Kharasch: I am not just sure, Mr. Stakem, because the banana market, as the Board has found, in a previous decision, is a highly fluctuating market and it is outside the record—

Chairman Stakem: Nineteen sixty one is enough.

Mr. Kharasch: Nineteen sixty one was a hopeless year in which the Standard Fruit Company, for example, lost ten million dollars. Conditions, I understand, are somewhat better today.

Chairman Stakem: Have you made an effort, or has your client made an effort, to get back on the Flota ships since September of 1961?

Mr. Kharasch: I don't really know, Mr. Stakem. There was a dispute in September 1961 and there were arguments about what the state of the banana market was, and whether the rates were fair or not.

Chairman Stakem: I realize that some of these questions are outside the record, of course.

Mr. Kharasch: Yes.

Chairman Stakem: Thank you.

Mr. Kominers: I have the answer if you want it, sir.

Chairman Stakem: I am going to deduct about a minute of your time if you interrupt again.

Mr. Kominers: The point, sir, is that I was a party to these discussions and Mr. Boyer was not, and of course it is Mr. Boyer who is arguing this case on behalf of respondents today.

So, if you want the answer you would have to address the question to me although I am not arguing this case.

Chairman Stakem: Off the record.

[fol. 693] (Discussion off the record.)

Chairman Stakem: Back on the record.

Mr. Kharasch: The banana business, as I was saying, is a risky business. It is a business in which prices fluctuate wildly, in which the independent importer and even the very large company, experience large swings of profits in one sailing and enormous loss in another.

This is one reason why I think it is very important that a shipper who has been excluded during good times should receive reparations for the time he was excluded. If you do not allow a man to operate in good times, then he is going to find it awfully hard to operate in bad times.

\*     \*     \*     \*     \*

[fol. 694]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
Docket No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME BOARD and UNITED STATES  
OF AMERICA, Respondents.

MOTION OF INTERVENOR PHILIP R. CONSOLO 1) TO DISMISS  
THE PETITION FOR REVIEW FOR LACK OF JURISDICTION, OR  
2) ALTERNATIVELY, TO REQUIRE PETITIONER TO FILE BOND  
—July 7, 1961

Philip R. Consolo, intervenor in Docket No. 16,369 hereby moves 1) to dismiss the petition for review for lack of jurisdiction, or 2) alternatively to require petitioner to file a bond in the amount of \$175,000. A Memorandum in support of this Motion is attached.

Oral argument is requested.

Respectfully submitted,

Robert N. Kharasch, William J. Lippman, Amy  
Scupi, Galland, Kharasch & Calkins, 1413 K Street,  
N.W., Washington 5, D.C., Attorneys for Inter-  
venor, Philip R. Consolo.

[File endorsement omitted]

[fol. 695]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 16,369

[Title omitted]

MEMORANDUM IN SUPPORT OF MOTION OF INTERVENOR PHILIP  
R. CONSOLO 1) TO DISMISS THE PETITION FOR REVIEW FOR  
LACK OF JURISDICTION, OR 2) ALTERNATIVELY, TO REQUIRE  
PETITIONER TO FILE BOND

Philip R. Consolo (hereafter Consolo) has moved for leave to intervene in this proceeding as a matter of right, pursuant to 5 U.S.C. §1038.

I. THE PROCEDURAL BACKGROUND

Consolo is an independent importer of bananas from Ecuador into the United States. Flota Mercante Grancolombiana (hereafter, Flota) is a common carrier by water of freight in the foreign commerce of the United States in the trade from Ecuador to United States Atlantic Coast [fol. 696] ports. On November 15, 1957 Consolo filed a complaint, Docket No. 827, with the Federal Maritime Board ("the Board") alleging that Flota's refusal to allot him any refrigerated space suitable for the carriage of bananas violated the Shipping Act, sections 14 and 16 (46 U.S.C. 812, 815). The Board sustained the complaint and by Order dated June 22, 1959 directed Flota to apportion its space among all qualified shippers. Flota complied on September 1, 1959.<sup>1</sup> The complaint also asked that the Board order Flota to pay reparation to Consolo for his damages flowing from the illegal exclusion. During the hearing in Docket No. 827, the question of the amount of reparation due was deferred pending a determination on the merits.

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<sup>1</sup> That order has been appealed to this Court in Docket No. 15,330 and briefs have been filed.

The Board's order of June 22, 1959 directed that further hearings be held on the claim for reparation.

At the reparation hearing, Consolo presented detailed proof of the availability of bananas in Ecuador, the week-by-week costs of purchasing bananas in Ecuador during the reparation period, and the week-by-week sales prices of bananas in the United States. This proof showed in detail that as a result of being excluded from shipping bananas on 195 Flota voyages during the period, Consolo was damaged [fol. 697] in the sum of \$589,398.87. The Recommended Decision of the hearing examiner would have restricted the reparation period to 105 voyages and awarded reparation of about half this sum (\$259,812.26), with interest to be added computed from the date of each sailing from which Consolo was excluded. The Board's decision of March 28, 1961, further restricted the period to 98 voyages, cut down the allocation of space upon which the amount of reparation was computed, and denied interest as an element of reparation, resulting in the award of \$143,370.98 which Flota now attacks in its petition for review.<sup>2</sup>

## II. THE STATUTORY DILEMMA

Consolo is one of the four or five complainants ever to have received a favorable reparation order during the 45-year history of the Shipping Act, 1916. Consolo, understandably, wishes to collect. Flota, equally understandably, wishes to have the reparation order set aside by a reviewing court. It is plain that *some* court has power to order payment to Consolo, and that *some* court has power to review the reparation order. The question posed by this motion is: what court?

[fol. 698] We set forth below the relevant statutory provisions. Essentially, there are two distinct lines of statutory authority. The Shipping Act, 1916, in §30 (46 U.S.C.

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<sup>2</sup> Consolo has filed a petition for review in this Court (No. 16,366) seeking review of the Board's order insofar as the order denies reparation for the full damages proved.

829) provides that in case of violation of any Board order for payment of money (as Flota has violated this reparation order), the person in whose favor such order was made may bring suit within a year in a district court, with the Board's findings and order *prima facie* evidence of the facts found. Under this provision no harm could come to Flota until Consolo files his complaint in a district court.<sup>3</sup> When the complaint is filed, Flota can obtain from the district court (and upon appeal, from a court of appeals and the Supreme Court) a full review of the Board's order.

But Flota has not chosen to await filing of a complaint in a district court. Instead, Flota has sought review of the Board's order here, claiming jurisdiction under the Hobbs Act (5 U.S.C. 1031 ff.) Under the Hobbs Act, the courts of appeals review such orders of the Board as were formerly reviewable under §31 of the Shipping Act (46 U.S.C. 830). Thus, Flota relies on a second and distinct line of statutory authority to sustain its right to review in this court.

[fol. 699] Consolo recognizes that Flota is entitled to one review of the Board's order in one court. But the filing of Flota's petition in this court presents the painful prospect of two reviews. Thus, the court might proceed to assume jurisdiction, pass upon Flota's petition, and deny it. At this point, absent any arrangement guaranteeing Consolo collection under the reparation order, Consolo would have to commence a new suit, in a district court of another circuit, to collect on the order (and such suit will have to be begun within a year of the date of the Board's order). Still worse, in such a district court suit, Flota might seek to introduce new evidence, arguing that under §30 of the Shipping Act the Board's order is only *prima facie* evidence of the facts. Then, arguing changed facts, Flota might ask for a new construction of the law from the district court. In other words, Flota might try to obtain a double review of the Board's order, and this court's labor in reviewing the order upon the

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<sup>3</sup> Suit cannot be commenced in the District of Columbia. We have requested counsel for Flota to accept service of a complaint in the District of Columbia, and our request has been refused.

facts of record before the Board might become so much waste motion.

A construction of the statutes which provides a double review is obviously untenable. A review in this court which does not result in a final disposition of the controversy is, equally obviously, equally undesirable. Consolo, for his part, accepts any construction of the statutes which results in one lawsuit leading to one final disposition of the controversy.

[fol. 700] Accordingly, by this motion we move alternatively:

(1) To dismiss Flota's Petition for Review on the ground that this court lacks jurisdiction. If this motion is granted, Consolo will promptly file a complaint in a district court, and the controversy will be completely decided in that court (with a possible appeal).

(2) Alternatively, if this court determines that it has jurisdiction to review the Board's order, we move that Flota be required to file a bond guaranteeing payment to Consolo if the Board's order is sustained. In this manner, the entire controversy can be settled and concluded before this court.

In the usual course of events, the party against whom an agency awards reparation has simply awaited suit in a district court. See, e.g., *Hernandez v. Bernstein*, 2 U.S.M.C. 62, 31 F. Supp. 76 (D.C.N.Y. 1940), 116 F. 2d 849 (C.A. 2d 1941). We are aware of only one case in which the losing party sought review under the Hobbs Act. In *Coastwise Line v. United States*, Docket No. 16756 (9 Cir.), the losing party before the Maritime Board filed a petition for review in the Ninth Circuit, accompanied by a supersedeas bond in [fol. 701] the form attached to this motion as Appendix A. The bond permitted a reviewing court to dispose of the entire controversy once and for all.

An injured shipper seeking reparation under the Shipping Act has a long and difficult job at best, far longer than a complainant in a district court. He must prove his case

four times: (1) prevailing on the merits before an Examiner and (2) the Board, and then (3) proving his damages to the Examiner and (4) to the Board. Even with a reparation order in hand, a suit in district court (a fifth argument), with a subsequent (sixth) appeal, and a possible (seventh) review by the Supreme Court, may consume additional years. Review by a Court of Appeals bypasses one court and if a bond is available, can result in less delay. If, however, litigation in the Court of Appeals does not result in a final disposition of the controversy, the injured shipper's burden becomes not merely onerous, but almost insupportable.

All relevant facts bearing on this court's jurisdiction are now before this court. Only harm can come from any postponement of a decision on jurisdiction. If jurisdiction is absent, the injured shipper is entitled to begin his suit in district court at once. If jurisdiction is present, the offending carrier should be compelled to post a bond which will permit the controversy to be terminated quickly and cleanly. [fol. 702] Absent such a bond, the petition for review becomes not an instrument for justice, but a weapon for obtaining oppressive delay through inconclusive litigation.

### III. THIS COURT HAS NO JURISDICTION TO REVIEW AN ORDER OF THE FEDERAL MARITIME BOARD AWARDING REPARATION

Flota asserts this court has jurisdiction to review the Board's order granting reparations under 5 U.S.C. §1031 et seq., 5 U.S.C. §1032 sets out the jurisdiction of courts of appeals. The applicable portion of that section reads:

"The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders . . . (c) such final orders of the United States Maritime Commission or the Federal Maritime Board of the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial re-



view pursuant to the provisions of section 830 of Title 46 [Shipping Act, §31] . . .”

Section 31 of the Shipping Act, 1916, says (46 U.S.C. §830):

“The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate [fol. 703] Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.”

The other provisions of the Shipping Act relating to enforcement of Board orders are §29 (46 U.S.C. §828):

“In case of violation of any order of the Federal Maritime Board, other than an order for the payment of money, the Board, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the Board determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.”

and §30 (46 U.S.C. §829):

*“Violation of orders of Board for payment of money*

In case of violation of any order of the Federal Maritime Board for the payment of money the person to whom such award was made may file in the district court for the district in which such person resides, or in which is located any office of the carrier or other person to whom the order was directed, or in which is located any point of call on a regular route operated by the carrier, or in any court of general jurisdiction of a State, Territory, District, or possession of the United States

having jurisdiction of the parties, a petition or suit setting forth briefly the causes for which he claims damages and the order of the Board in the premises.

In the district court the findings and order of the Federal Maritime Board shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor shall he be liable for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If a petitioner in a district court finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit.

[fol. 704] All parties in whose favor the Federal Maritime Board has made an award of reparation by a single order may be joined as plaintiffs, and all other parties to such order may be joined as defendants, in a single suit in any district in which any one such plaintiff could maintain a suit against any one such defendant. Service of process against any such defendant not found in that district may be made in any district in which is located any office of, or point of call on a regular route operated by, such defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

No petition or suit for the enforcement or an order for the payment of money shall be maintained unless filed within one year from the date of the order."

Thus, actions formerly brought under §31 of the Shipping Act before a three judge court—the forum for review of ICC orders—are now brought before a court of appeals under Section 2 of the Hobbs Act (5 U.S.C. §1032). Section 31, however, says that the venue and procedure in suits to review Board orders shall be the same as suits in regard to ICC orders *except* as otherwise provided. This exception must have reference to §30 of the Shipping Act (46 U.S.C. §829) which sets forth in considerable detail

the very special venue and procedure applicable to suits to enforce Board orders *for the payment of money*.<sup>4</sup>

[fol. 705] Thus, the Hobbs Act makes orders which were reviewable under §31 of the Shipping Act now reviewable in this court. An order awarding reparation is, however, *not* reviewable under §31 because that section exempts orders "otherwise provided" for, and orders awarding reparation *are* "otherwise provided" for under §30. This reading of the statutes makes sense when it is considered that if Flota can review here the Board order granting reparation, it might still claim a right to a second complete review.

The statutory scheme allows the person against whom a reparation order has been filed to obtain full review by simply not complying with the order; the complainant before the agency must then sue on the award in District Court.<sup>5</sup> The defending carrier can contest the order on both [fol. 706] the law *and* the facts, because the statute provides that the Board order is "prima facie evidence of the facts therein stated." *Meeker v. Lehigh Valley R. Co.*, 236

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<sup>4</sup> Note that §30 of the Shipping Act does not apply to suits to review a Board denial of reparation. In *D. L. Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954) cert. denied 348 U.S. 839, the court held that §30 "applies only to actions to enforce reparations awarded by the Board" (210 F. 2d at 949), and review of a Board order *denying* reparations lies in the court of appeals.

<sup>5</sup> cf. *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (C.A. D.C., 1941), affirmed Per Curiam by an equally divided court 319 U.S. 732 (1943) and approved in *Union Pacific Railroad Company v. Price*, 360 U.S. 601, 612-16 (1959) where an employer sued for a declaratory judgment in court after his employee was successful before the National Railroad Adjustment Board. The court, holding there was no jurisdiction to entertain the suit, said:

" . . . unless the employee institutes an enforcement suit, the carrier cannot be prejudiced in any legal sense by the absence of an opportunity to sue. The only purpose of such a suit would be to set aside or nullify the award. But this is not necessary for adequate protection of the carrier's rights. The award is not self-enforcing or enforceable by the Board . . . The Act confers upon the employer the powerful advantage of defensive position in respect to the award. It places the burden of enforcement upon the employee . . ." (124 F. 2d at 246)

U.S. 412 (1915), quoted in *Compagnie Generale Transatlantique v. American Tobacco Co.*, 31 F. 2d 663, 667 (C.C.A. 2, 1959) cert. denied 280 U.S. 555. Any errors of law committed in District Court are of course reviewable in the appropriate court of appeals.

If this court assumes jurisdiction to review the Board order awarding reparations, and sustains the order, Flota still may not pay, and Consolo would still be required to sue in some district court. A decision of this court sustaining the reparation order presumably would bar Flota from raising any legal defenses in the district court suit which had already been argued here. But if Flota attempted to contest the Board's findings of facts in the district court suit, as it might, the entire factual basis of this court's decision might shift. As a result, the review in this court (and a possible further review by the Supreme Court), would become so must waste motion.

Consideration of the statutory scheme for review prior to 1950, and the precedents, tends to show that the reparation orders described in §30 of the Shipping Act (46 [fol. 707] U.S.C. 829) were not included in the orders reviewable by three-judge courts under §31 (46 U.S.C. 830). Thus, suppose that prior to 1950 a party against whom a reparation award was made came to a three-judge court and sought to have the order set aside. Under the doctrine of *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949), the three-judge court would presumably have held that a single district judge, not the three-judge court, should pass on the validity of the award.<sup>6</sup> Thus, a single district judge would be asked to declare that money was *not* owing before the successful party sued on the award—a fairly ludicrous situation.<sup>7</sup>

<sup>6</sup> See *Shippers Car Supply Com. v. I.C.C.*, 160 F. Supp. 939, 942-43 (D.C. Ore., 1958).

<sup>7</sup> "It is not thinkable that it should have been intended that a court of three judges should be convened, with direct appeal from their actions to the Supreme Court, to pass upon the validity of an order which amounts to no more than prime facie evidence." *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, 852 (D.C. W. Va., 1930), aff'd 283 U.S. 804.

In *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, 850 (D.C. W. Va., 1930), aff'd 283 U.S. 804, plaintiff brought suit before a three-judge court to set aside certain parts of an ICC reparation order. The court dismissed the suit for lack of jurisdiction:

[fol. 708] "... even if the suit be considered as one brought to enjoin or set aside the order of the Commission, we are satisfied that the court has no jurisdiction to entertain it, for the reason that the order is a mere reparation order and is not one which may be enjoined or set aside under title 28, §41 (28), of the Code . . . And when we take into consideration the history of the Interstate Commerce Act and its amendments and the nature of reparation orders, we are certain that it was not intended that they be included among those which the court was given the power in a suit in equity before three judges to enjoin or set aside." <sup>8</sup>

Under the Hobbs Act, the courts of appeal derived exclusive jurisdiction to review such orders of the Maritime Board as were "subject to judicial review pursuant to the provisions" of §31 of the Shipping Act (46 U.S.C. 830). Section 31 provides for the same review of Board orders as that provided for ICC orders, i.e., review before a three-judge court. Since I.C.C. orders awarding reparation are not reviewable by a three-judge court, the courts of appeal did not derive from the Hobbs Act jurisdiction to review orders granting reparation.

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<sup>8</sup> This case was approved in *Baltimore & O. R. Co. v. United States*, 87 F. 2d 605 (C.C.A. 3d, 1937). The dissent in *United States v. I.C.C.*, 337 U.S. 426 (1949) mistakenly cited this case as holding that the *shipper* cannot review the Commission's *refusal* to award reparation (337 U.S. at 453-54). The suit, as stated above, was brought by the *carrier* to set aside the Commission's *award* of reparations.

[fol. 709]

IV IF THIS COURT HAS JURISDICTION TO REVIEW THE BOARD'S ORDER AWARDING REPARATION, PETITIONER SHOULD BE REQUIRED TO FILE A BOND.

We have shown above that the statutes and the precedents support the conclusion that suits to review reparation orders of the Maritime Board are *not* covered by the Hobbs Act, and thus that this court lacks jurisdiction to pass on Flota's petition. It must be conceded, however, that the legislative history of the Hobbs Act reveals a definite Congressional purpose to provide a new, expeditious, and exclusive method of review of agency orders. Thus, in House Report 2122, 81st Cong. 2d sess., the Committee on the Judiciary said:

"At present the method of review of most of the judicially reviewable orders of the agencies involved in the proposed bills (the U.S. Maritime Commission, the Secretary of Agriculture, and the Federal Communications Commission) is prescribed by many provisions scattered throughout different statutes. These provisions have a common feature, that the controversy in relation to the orders complained of is heard and decided *de novo* in a district court. In cases in which the action is brought by the administrative agency the case may usually be heard by a single district judge. But in many types of cases, in which a party affected seeks to restrain or set aside the order of the administrative agency as illegal, the present law requires that it shall be heard in a district court with a panel of three judges, one of whom at least shall be a circuit judge and the others of whom may be district [fol. 710] judges. The pattern for this was established by the Urgent Deficiencies Act of 1913, and is continued by the present law (title 28, U.S.C. sec. 2284). In cases under this provision and others adopting the procedure, in which the trial in the district court is by three judges sitting *en banc*, there is a

right of review by appeal to the Supreme Court of the United States.

"The pending bill would substitute for the present mode of judicial review of the orders of the agencies to which it applies, a review by the appropriate circuit courts of appeals upon the record made before the administrative agency with further review on certiorari from the Supreme Court in its discretion, as in most other cases coming from the courts of appeals. This is the pattern established for review of orders of the Federal Trade Commission in 1914 (15 U.S.C. 45c) and followed by other laws since then in relation to many other agencies, including the Securities and Exchange Commission, the Bituminous Coal Commission, and the National Labor Relations Board. It is the more modern method and is generally considered to be the best method for the review of orders of administrative agencies.

"The proposed method of review has important advantages in simplicity and expedition over the present method. First, the submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court, and thus going over the same ground twice. Under the Administrative Procedure Act of June 11, 1946, the record before the agencies will be made in such a way that all questions for the determination of the courts on review, and the facts bearing on them, will be presented and the rights of the parties will be fully protected. The bill has adequate provisions in section 7 (b) and (c) for the taking of evidence either by the agency or in the district court, when for one reason or another that is necessary because a suitable hearing was not held prior to initiation of the proceeding in the court of appeals.

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"The mode of judicial review provided in this bill [fol. 711] has been evolved from long study and care-

ful consideration by all persons concerned with the difficult questions involved. It represents an important improvement in judicial procedure—one that will make for economy and expedition in the disposition of a considerable class of business in the Federal Courts.”

There is thus evidence of a plain intent to provide a new and improved mode of review avoiding the need to make a second record before a district court. Moreover, there is some evidence that Maritime Board reparation orders were specifically included within the coverage of the Hobbs Act. Reparation orders of the Board are issued under section 22 of the Shipping Act (46 U.S.C. 821) which allows the filing of complaints with the Board, calls for Board investigation of complaints, followed by orders, and also permits the Board to “direct the payment, on or before a day named, of full reparation to the complainant for the injury caused . . . .”<sup>9</sup>

[fol. 712] The then solicitor of the Maritime Commission, Mr. Page, told the House Committee on the Judiciary that “the act as drawn specifies appeals from orders made under certain sections of our act. It omits that section under which a vast majority of our orders are issued, section 22 of the Shipping Act, 1916, and we feel . . . that

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<sup>9</sup> The full section reads:

Sec. 22. That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.



the provisions of this act should apply to all reviewable orders of the Maritime Commission [now Maritime Board] . . . ."<sup>10</sup> Following Mr. Page's statement, and exchange of correspondence with Judge Phillips,<sup>11</sup> the Hobbs Act was amended to its present form, granting to the courts of appeal jurisdiction over all orders reviewable under §31 of the Shipping Act (46 U.S.C. 830).

Thus, there is evidence of specific congressional intent to extend Hobbs Act review to a wide range of Maritime [fol. 713] Board orders, with the aim of utilizing the "more modern" and "best" method of review. This intent has been respected, and the second circuit has held that the Hobbs Act covers the Maritime Board's orders denying reparation: *D.L. Piazza Co. v. West Coast Line*, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839.

The specific questions remain, however, (1) whether the language of the statutes permits an interpretation allowing Hobbs Act review of orders *granting* reparation and (2) whether the intent of the Congress to provide a single, modern, expeditious method of review can be effectuated by providing a means for terminating the controversy in this court.

Any argument supporting review under the Hobbs Act must face at the outset that 5 U.S.C. 1032 begins by granting to the courts of appeals exclusive jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" named orders. There is no explicit provision for *enforcement* of reparation orders.

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<sup>10</sup> Statement of Paul D. Page, Jr., Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1468, H.R. 1470, and H.R. 2271 of the 80th Congress (1947) and before Subcommittee No. 2 on H.R. 2915 and H.R. 2916 of the 81st Congress (1949), at p. 137. Note that when Mr. Page refers to a "vast majority" of orders made under section 22 he means that most orders were made after hearings on complaints. He did not mean that a vast majority of orders required payment of reparation—for very few reparation orders have ever been entered by the Maritime Board.

<sup>11</sup> Hearings, *ibid.*, at pp. 145, 147, 149.

Nevertheless, 5 U.S.C. 1032 gives the courts of appeals jurisdiction to review such Maritime Board orders "as are now subject to judicial review under section 31 of the Shipping Act (46 U.S.C. 830)." Section 31 of the Shipping Act, in turn, speaks of "suit brought to enforce, suspend, or set [fol. 714] aside in whole or part," any order of the Board. Therefore, since all §31 powers are apparently transferred to the courts of appeals, the power to enforce reparation orders is arguably also transferred.<sup>12</sup> In short, if a court of appeals can "determine the validity" of a reparation order and determine that the order is valid, the valid order should be forthwith enforced by the court of appeals. It would be intolerable to contemplate a second complete review of the same controversy.

Assuming, then, that Flota's petition for review is properly before this court, there remains the practical problem of assuring that the entire controversy will be terminated here. The simplest and quickest way of assuring a quick and final end to the controversy is to require Flota to file a bond in this court in an amount sufficient to insure payment of the sum specified in the reparation order in the event this court upholds the order. Such a bond was filed in the only case we are aware of where Hobbs Act review was sought of a Maritime Board reparation order.

In *Aleutian Homes v. Coastwise Line*, 5 F.M.B. 602 (1959), the Board awarded a shipper \$17,000 reparation [fol. 715] against a carrier for unlawful overcharges. The carrier filed a petition for review in the ninth circuit, *Coastwise Line v. United States*, (C.A. 9, No. 16756), together with a supersedeas bond covering the amount of the reparation award. A copy of the bond filed is attached to this motion.

The necessity for a bond is plain. Absent a bond, the controversy cannot be terminated in this court. Further,

<sup>12</sup> If all §31 powers are not transferred to courts of appeals, there would remain some residual three-judge court jurisdiction—an incredible result. Cf. *Safe Harbor Water Power Corp. v. Federal Power Com'n*, 124 F. 2d 800, 804 (C.C.A. 3d, 1941), cert. denied 316 U.S. 663.

if it were not for the pendency of Flota's petition for review, Consolo could sue on his reparation award in a district court, and proceed to judgment, and the petition for review would then become moot.<sup>13</sup>

If Flota's petition for review is to be heard here, a district court suit on the reparation award clearly must be delayed. By filing its petition here, rather than awaiting suit in a district court, Flota has chosen this forum for review. All legal and factual issues can be tried here: legal arguments are of course available, and additional facts (if any) could be brought before this court by the machinery of 5 U.S.C. 1037 (c).

It is difficult to imagine what arguments Flota could use to oppose the filing of a bond. Surely, Flota cannot [fol. 716] claim the right to a second complete review in a district court. Equally surely, there can be no question that this court in its discretion can require a bond. While in the usual appeal a bond is required as condition of a stay<sup>14</sup>, here, although Flota has sought no stay, a bond is required if the review is to be final and effective. If Flota really wants this court to dispose of the controversy, it should file a bond. If, however, Flota is only seeking delay by imposing on this court a "preliminary" review, to be followed by an attempt at a retrial in district court, then Flota will not want to post a bond.

Clearly, Flota has no right to two reviews; equally clearly Flota is entitled to one review. If the one review is to be in this court a bond should be posted; if no bond is forthcoming Flota's petition should be dismissed.<sup>15</sup>

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<sup>13</sup> It would be perfectly appropriate, therefore, if Flota filed no bond, for this court to hold Flota's petition in suspense and permit Consolo to proceed to judgment in a district court.

<sup>14</sup> See, e.g., *Beaumont S.L. & W. Ry. Co. v. United States*, 282 U.S. 74 (\$3,000,000 bond on stay of order enforcing division of rates); *Breswick & Co. v. United States*, 75 S. Ct. 912 (opinion of Mr. Justice Harlan requiring bond for plaintiffs' "greatest possible exposure to loss pending appeal").

<sup>15</sup> Alternately, the petition could be held in suspense until the controversy is decided in district court.

[fol. 717] Oral argument is requested.

Respectfully submitted,

Robert N. Kharasch, William J. Lippman, Amy  
Scupi;

Galland, Kharasch & Calkins, 1413 K Street, N.W.,  
Washington 5, D.C.,

Attorneys for Intervenor Philip R. Consolo.

[fol. 718] July 7, 1961

[fol. 719]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S. A., Petitioner,

v.

FEDERAL MARITIME BOARD and UNITED STATES OF AMERICA,  
Respondents,

and

PHILIP R. CONSOLO, Intervenor.

REPLY OF RESPONDENTS TO INTERVENOR'S MOTION TO DISMISS  
OR REQUIRE A BOND—Dated August 1, 1961 and filed  
August 7, 1961

Intervenor, Philip R. Consolo (Consolo), has moved to  
dismiss the petition for review for lack of jurisdiction or  
alternatively to require petitioner to post a bond. Respon-  
dents United States and Federal Maritime Board (the Gov-  
ernment) take the position that this Court has jurisdiction

[File endorsement omitted]

and therefore oppose so much of the motion as requests dismissal. As to the request for the bond, the Government believes that this is a matter primarily between the private parties to this litigation and that it would be inappropriate for the Government to comment on it.

On March 28, 1961, the Federal Maritime Board (the Board) entered an order directing Flota Mercante Grancolombiana (Flota), a common carrier by water in foreign commerce, to pay to Consolo, a banana importer, the sum [fol. 720] of \$143,370.98 as reparations for injury caused by Flota's violation of Sections 14 and 16 of the Shipping Act, 1916, as amended (46 U.S.C. 812, 815). On May 23, 1961, Consolo filed with this Court (No. 16,366) a petition for review of that order requesting *inter alia* that this Court direct the Board to make a supplementary award of \$426,111.69 in addition to the award of \$143,370.98. On May 24, 1961, Flota filed with this Court (No. 16,369) its petition for review asking *inter alia* that this Court set aside the order making the award of \$143,370.98. The Board's order of March 28 is thus the subject of cross-petitions for review. Both Consolo and Flota are dissatisfied with the reparation award, Consolo because it is smaller than the amount he believes himself entitled to, Flota because it believes Consolo is not entitled to any award at all.

Consolo's motion to dismiss for lack of jurisdiction is addressed solely to Flota's petition to review (No. 16,369). Consolo's theory is that while an order *denying* reparations is subject to review exclusively in a court of appeals under § 2 of the Judicial Review Act of 1950 (5 U.S.C. 1032), an order *granting* an award is subject to review solely in the district court under § 30 of the Shipping Act (46 U.S.C. 829). Thus, under Consolo's theory, the Board's order in the instant case, insofar as it denied Consolo the full amount claimed, is subject to review only in a court of appeals while insofar as it granted him a portion of the claimed amount is subject to review only in a district court. We believe that Consolo is mistaken and that the Board's

order in both its aspects is subject to this Court's jurisdiction.

[fol. 721] Flota's petition to have this Court determine the validity of and set aside the Board's order awarding Consolo reparations is based on Section 2 of the Judicial Review Act of 1950 (5 U.S.C. § 1032). That section provides that the several courts of appeals shall have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Board as were previously "subject to judicial review pursuant to the provisions of Section 31, Shipping Act, 1916 \* \* \*."<sup>1</sup> Section 31 of the Shipping Act, 1916 (46 U.S.C. 830),<sup>2</sup> states that "except as otherwise provided" the procedure governing suits "to enforce, suspend, or set aside, in whole or in part, any order of the [Board]" shall [fol. 722] be the same as in similar suits "in regard to orders of the Interstate Commerce Commission \* \* \*."<sup>3</sup> The procedures for setting aside or modifying Interstate

<sup>1</sup> Section 2 of the Judicial Review Act of 1950, 64 Stat. 1129, 5 U.S.C. 1032, provides in pertinent part as follows:

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, \* \* \* (c) such final orders of the \* \* \* Federal Maritime Board \* \* \* entered under authority of the Shipping Act, 1916, as amended, \* \* \* as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

<sup>2</sup> Section 31 of the Shipping Act provides as follows:

The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the [Board] shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

<sup>3</sup> The only exceptions expressed in the Shipping Act appear in Sections 29 and 30 (46 U.S.C. 828, 829), neither of which relates to suits to *set aside* Board orders. Section 29 provides for suits by the Attorney General to enjoin violations of Board orders. Section 30 provides for suits by private parties to enforce unsatisfied Board awards of reparations.

Commerce Commission orders by the district courts were established by the Urgent Deficiencies Act of 1913, 38 Stat. 208, 219-220. Thus, Board orders which prior to 1950 were reviewable under the procedures established by the Urgent Deficiencies Act were transferred by the Judicial Review Act to the jurisdiction of the several courts of appeals. The issue here is whether an order granting reparations was an order thus reviewable.

The applicable review provision of the Urgent Deficiencies Act was incorporated in 28 U.S.C. (1946 ed.) § 41(28), the substance of which now appears in the Revised Code as 28 U.S.C. 1336 (See *United States v. Interstate Commerce Commission*, 337 U.S. 426, 432), and provides:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Prior to the Supreme Court's decision in *United States v. Interstate Commerce Commission*, 337 U.S. 426, it was thought that a reparation order, whether granting or denying reparations, was not an "order" subject to challenge under the Urgent Deficiencies Act. See the dissenting opinion [fol. 723] in *United States v. Interstate Commerce Commission*, *supra*. In that case, however, which involved a suit by the United States in its proprietary capacity as a shipper to set aside an order of the Commission denying it reparations, the Court squarely held that the reparation order issued by the Commission was "an 'order' subject to challenge under 28 U.S.C. (1946 ed.) § 41(28)," i.e., under the Urgent Deficiencies Act, 337 U.S. at 440-441.<sup>4</sup> See also

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<sup>4</sup> The Court went on to hold that although the order was subject to review under the Urgent Deficiencies Act, a three-judge court, normally convened pursuant to that Act (see 28 U.S.C. 2325) would not be required to hear the case on remand. It so held because it concluded that a reparation order was not of the character which Congress had in mind when it provided the expedited appellate procedure which results from a hearing before a three-judge court. 337 U.S. at 442-443.



*Pennsylvania Ry. v. United States*, 363 U.S. 202, 205. This view has since been applied to a Maritime Board order. *Piazza v. West Coast Line*, 210 F. 2d 947 (C.A. 2), certiorari denied, 348 U.S. 839.

The pertinent legislative history of the Judicial Review Act of 1950 provides no basis for distinguishing between reparation orders and other types of orders. Indeed there is evidence, as Consolo himself concedes (Memorandum, p. 17), "that Maritime Board reparation orders were specifically included within the coverage of the [Judicial Review] Act." An earlier version of the Act, H.R. 2916, 81st Cong., 1st Sess., provided only that the several courts of appeals should have exclusive jurisdiction of "final orders of the [Board] entered under authority of sections 15, 17, 18, and 19 of the Shipping Act, 1916, as amended." All other orders of the Board were to "remain unaffected \* \* \*." Hearings before Subcommittee 2 of the House Committee on the Judiciary on H.R. 2915 and H.R. 2916, 81st Cong., 1st Sess., p. 107. Spokesmen for the Board, while agreeing with the general purposes of the bill, recommended that H.R. 2916 be broadened. They stated (*id.*, p. 145):

\* \* \* the provisions of the bill should be sharpened so as to make clear that the new procedure shall apply to all reviewable orders of the regulatory agencies involved \* \* \*.

\* \* \* As it stands the bill would not apply to orders other than those issued under the specified sections of the Shipping Act, 1916, \* \* \* and while the [Board] has not been able to make a statistical investigation to ascertain the number of orders issued under various sections of the acts administered by the [Board], it can be definitely stated that the largest number of important regulatory orders which the [Board] issues comes under section 22 of the Shipping Act, 1916. \* \* \*

Section 22 of the Act (46 U.S.C. 821), it should be noted, is the complaint section of the Act pursuant to which Consolo instituted the administrative proceeding and is the



section which authorizes the Board to make reparation orders. In keeping with the views it disclosed to Congress, the Board offered an amendment providing for review in the courts of appeals of such final orders of the Board "as are subject to judicial review, pursuant to the provisions of section 31 of the Shipping Act, 1916 \* \* \*." *Id.*, pp. 149-150. Explaining the proposed amendment, the Board's representatives stated (*id.*, p. 150):

[fol. 725] That provision [section 31 of the Shipping Act, 1916] is the one which brings the orders of the [Board] under the provisions of the Urgent Deficiencies Act.

This bill \* \* \* makes those provisions applicable to reviewable orders under the Urgent Deficiencies Act.

The language ultimately adopted by Congress in the Judicial Review Act is virtually identical with that proposed by the Board. The legislative history thus fully confirms the intention of Congress to transfer to the court of appeals jurisdiction over all proceedings to modify or set aside final Board orders issued under the Shipping Act, including reparations orders issued under Section 22 of that Act.

The reparation order here in issue involves "the same parties, the same disputes, the same claims for money damages, and the same statutes." *United States v. Interstate Commerce Commission*, 337 U.S. 426, 443. Yet under Consolo's view, as we have already noted, Consolo may challenge the order insofar as it denied him the full amount claimed only in this Court but Flota may challenge the order insofar as it allowed Consolo any amount only in the district court. Such a view is hardly in keeping with the Congressional objective in passing the Judicial Review Act which was to make for "simplicity and expedition" in reviewing the orders of the Board and other designated agencies. H. Rep. 2122, 81st Cong., 2d Sess. 4.

The dictum in *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, 850 (N.D. W.Va.), *aff'd per curiam* 283 U.S. 804, cited by Consolo (Memorandum p. 14), that a

reparation order is not "any order" within 28 U.S.C. § 41 (28) (i.e., the Urgent Deficiencies Act) and therefore "is not one which may be enjoined or set aside under title 28, [fol. 726] §41(28)," flies squarely in the face of the contrary holding in *United States v. Interstate Commerce Commission*, 337 U.S. 426, discussed *supra*, and is no longer the law.

We agree with Consolo that Flota is entitled to but one review of the issues raised by its petition to review. But that is all Flota will get if the Board order in Consolo's favor is affirmed since, as was said in *In Re Federal Waters & Gas Corp.*, 188 F. 2d 100, 104 (C.A.D.C.), cert. denied sub nom. *Chenery Corp., et al. v. S.E.C., et al.*, 341 U.S. 953:

"When an administrative agency exercises power of a quasi-judicial or adjudicatory nature and its order has been affirmed by the final judgment of the reviewing court, the rights and liabilities necessarily determined by the judgment of affirmance become *res judicata*. [citations omitted]"

Respectfully submitted,

James L. Pimper, General Counsel;

Robert E. Mitchell, Assistant General Counsel, Division of Litigation;

Thomas D. Wilcox, Attorney, Federal Maritime Board.

Lee Loevinger, Assistant Attorney General, Antitrust Division;

Richard A. Solomon, Attorney;

Irwin A. Seibel, Attorney, Department of Justice.

Washington 25, D. C.

August 1, 1961

[fol. 727]

16,369

Note—Not part of record. Referred to in supplemental brief of respondents Flota Mercante Grancolombiana, S.A. in opposition (filed May 18, 1965).

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[fol. 728]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,  
Respondents,

PHILIP R. CONSOLO, Intervenor.

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INTERVENOR'S REPLY TO ANSWERS TO MOTION TO DISMISS OR  
REQUIRE BOND—Filed August 8, 1961

*I. Scope of This Reply*

Four business days ago petitioner ("Flota") filed a 49 page Answer to Intervenor Consolo's Motion to Dismiss or Require Bond. In the brief time available before oral argument, it is not possible to prepare a reply discussing [fol. 729] in detail each of 56 cases cited by Flota, or each twist in the arguments Flota presents. In order to present our principal objections to Flota's arguments in a minimum space, this reply is devoted first to a statement in broad outline of the major considerations which refute Flota's arguments, and second, to a short commentary on the

[File endorsement omitted]

cases Flota cites. The Board's answer which avoids taking a position on most crucial issues, requires no further comment.

## II. *Flota's Arguments*

### [fol. 730] C. *The "Statutory Dilemma"*

At pages 23-28 of its answer Flota contemplates without pain the prospect that it will obtain two reviews. Flota sees no anomaly in a reading of the Hobbs Act which complicates, not simplifies the review procedure, and advances the proposition that double reviews are common, and favored by the law. The only comment required is an examination of the cases Flota cites, conducted below.

We repeat that for our part we are content with a reading of the statutes which complies with the purpose of the Hobbs Act to simplify and modernize reviews. The procedures of section 30 requiring suits in district courts are tortuous, and highly advantageous to the offending carrier. If the Hobbs Act can be read to allow Flota the option of having its review here, well and good. Flota's election to precipitate review here will speed up termination of the controversy. The issues can be settled here, and if the merits justify a finding that the Board's order was right and valid, the controversy should be at end, and Flota should pay its just debts.

[fol. 731] Flota, however, although reprinting the lengthy specification of errors of law and fact which appeared in its petition for review, claims (Answer, p. 27) that even if this Court finds the Board right on the law and the facts, another review is necessary in district court because "a whole range of other issues [all unspecified] is possible." Such a concept of the reviewing function is offensive. If Flota thinks there are "other issues" which are valid defenses, it should have presented them to this Court—or awaited review in the district court and not sought review here. Since review was sought here, the issues should be

openly, fairly, and finally litigated here—as Congress intended. There may be two roads to review, but a litigant must choose one.

#### D. *The Bond*

The last pages of Flota's answer (Answer, pp. 28-36) contend that this Court, having jurisdiction, should not adopt the procedural means to assure a final disposition of the case. Essentially the claim is that this Court lacks "enforcement" powers and that a bond would confer such powers. The conflict with previous Flota arguments is obvious.

Thus, Flota argues that this Court has jurisdiction (a) because the Hobbs Act transferred all section 31 powers to the courts of appeals and (b) because section 31 did [fol. 732] apply to reparation orders. Well and good, for if this is so, the section 31 powers "*to enforce, suspend or set aside*" are in this Court, and justice can be done between the parties. To do justice requires that a bond be filed, or, if Flota refuses, the dismissal or suspension of review proceedings awaiting disposition of a suit in district court.

### III. *Flota's Cases*

*Answer, page 10:* Among the plethora of cases Flota cites there is *no* case under the Urgent Deficiencies Act, the Interstate Commerce Act, the Judicial Code, the Shipping Acts, or the Hobbs Act in which a carrier has obtained review of an order directing it to pay reparation *before* the order was sued upon.

It is true that in 1911 the Commerce Court decided, on the same day, four long-forgotten cases in which it held that the Commerce Court Act endowed it with jurisdiction of suits to set aside reparation orders. The jurisdictional points decided in these cases have never been relied upon or followed in the last fifty years. Instead, the reasoning of the Commerce Court was expressly disavowed in *Brady*

v. *I.C.C.*, 43 F.2d 847, affirmed 283 U.S. 804, and the court's [fol. 733] other holdings were universally ignored.<sup>4</sup>

. . . . .

[fol. 734]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
No. 16,366

—  
PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME BOARD and THE UNITED STATES OF  
AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

—  
PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL MARITIME BOARD

—  
BRIEF FOR PETITIONER PHILIP R. CONSOLO—  
December 8, 1961

. . . . .

[fol. 735]

Conclusion

Although the Board agreed that the carrier's behavior here was an inexcusable violation of the Shipping Act, the

<sup>4</sup> For example, in one of these cases, *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667 (Commerce Ct., 1911), the Commerce Court held it had jurisdiction to set aside an order denying reparation—yet the “negative order” doctrine was long in vogue in the district courts and in the Supreme Court under the Urgent Deficiencies Act. See *U.S. v. I.C.C.*, 337 U. S. 426.

Board trimmed the reparation claim in all possible ways. In three respects it cut away too much, and failed to award the full reparation which the law provides. With the detailed proof of damages present in the record, calculation of the additional reparation due is a matter of arithmetic. While the case might be returned to the Board to enter a supplementary award, all the facts necessary to a complete disposition of the entire controversy are now before this Court. Flota has chosen to bring its review of the award here, rather than awaiting a suit in District Court. Thus, the Court can enter an order terminating the entire controversy by requiring Flota to pay Consolo the amount awarded by the Board, plus (1) the reparation due for the period November 15, 1955-August 23, 1957, (2) the reparation due based on an allocation of one-third of Flota's refrigerated space to Consolo during the reparation period, and (3) interest on the reparation due for each sailing from which Consolo was excluded from the date of each sailing to the date of the award.

[fol. 736]                      Respectfully submitted,

Robert N. Kharasch, William J. Lippman, Amy  
Scupi, Galland, Kharasch, Calkins & Lippman,  
1824 R Street, N.W., Washington 9, D. C., Attor-  
neys for Philip R. Consolo.

December 8, 1961

[File endorsement omitted]

[fol. 737]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
No. 16,366

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PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME BOARD and THE UNITED STATES OF  
AMERICA, Respondents,  
FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor,

---

No. 16,369

---

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

v.

FEDERAL MARITIME BOARD and THE UNITED STATES OF  
AMERICA, Respondents,  
PHILIP R. CONSOLO, Intervenor.

---

PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL MARITIME BOARD

---

REPLY BRIEF OF PHILIP R. CONSOLO, PETITIONER IN No.  
16,366; AND BRIEF AS INTERVENOR IN No. 16,369—  
December 8, 1961

. . . . .

[fol. 738]

Conclusion

The unquestionable facts and the relevant law require  
(a) dismissal of Flota's petition to review in No. 16,369;  
and (b) grant of Consolo's petition in No. 16,366. Flota



has chosen to seek review of the award in this Court. All the facts are before the Court, and the controversy is ripe for final disposition. Accordingly, the Court should enter an order terminating the controversy by requiring Flota to pay to Consolo the full reparation claimed in No. 16,366.

Respectfully submitted,

Robert N. Kharasch, William J. Lippman, Amy Scupi, Galland, Kharasch, Calkins & Lippman,  
1824 R Street, N.W., Washington 9, D. C., Attorneys for Philip R. Consolo.

December 8, 1961

[fol. 739]

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,330

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FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF  
AMERICA, Respondents,

PHILIP R. CONSOLO, BANANA DISTRIBUTORS, INC.,  
Intervenors.

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No. 16,366

---

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF  
AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

---

No. 16,369

---

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF  
AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

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[fol. 740]

On Petitions for Review of Orders of the Federal Maritime  
Board, Now Federal Maritime Commission

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OPINION—Decided April 26, 1962

Mr. J. Alton Boyer, with whom Mr. Odell Kominers was on the brief, for petitioners in No. 15,330 and No. 16,369 and for intervenor in No. 16,366. Mr. T. S. L. Perlman also entered an appearance for petitioner in No. 15,330.

Mr. Robert N. Kharasch, with whom Mr. William J. Lippman and Mrs. Amy Scupi were on the brief, for petitioner in No. 16,366.

Mr. Thomas D. Wilcox, Attorney, Federal Maritime Commission, with whom Messrs. James L. Pimper, General Counsel, Federal Maritime Commission, and Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, were on the brief, for respondents. Mr. Edward Aptaker, Assistant General Counsel, Division of Regulations, Federal Maritime Commission, at the time the brief was filed, was on the brief for respondents in No. 15,330. Mr. Irwin A. Seibel, Attorney, Department of Justice, was on the brief for respondents in No. 15,330, and also entered an appearance for respondent United States of America in No. 16,366 and No. 16,369. Mr. Richard A. Solomon, Attorney, Department of Justice, was on the brief for re-

[File endorsement omitted]

spondents in No. 16,366 and No. 16,369 and also entered an appearance for respondent United States of America in No. 15,330.

Mr. Robert N. Kharasch, with whom Mr. William J. Lippman was on the brief, for intervenor Philip R. Consolo in No. 15,330 and No. 16,369. Mr. George F. Galland also entered an appearance for intervenor Philip R. Consolo in No. 15,330 and No. 16,369.

Messrs. Richard W. Kurrus and James N. Jacobi were [fol. 741] on the brief for intervenor Banana Distributors, Inc., in No. 15,330.

Before WILBUR K. MILLER, Chief Judge, and BAZELON and WASHINGTON, Circuit Judges.

WASHINGTON, Circuit Judge: These cases raise issues concerning the grant of reparations by the Federal Maritime Board<sup>1</sup> to Philip R. Consolo, a banana shipper, against Flota Mercante Grancolombiana, S.A. ("Flota"), a steamship company, for Flota's allegedly discriminatory treatment of Consolo, who sought space on Flota's vessels for the shipment of bananas from Ecuador to the United States.

In our case No. 15,330, Flota challenges an order of the Board, dated June 22, 1959, in which the Board found Flota to be a common carrier of bananas between the United States and Ecuador, and to have discriminated against Consolo in the allocation of space, in violation of Sections 14 and 16 of the Shipping Act of 1916, as amended, 46 U.S.C. §§ 812, 815 (1958).<sup>2</sup> In No. 16,369, Flota challenges a later order of the Board, issued March 30, 1961,

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<sup>1</sup> The Federal Maritime Board has recently been succeeded by the Federal Maritime Commission. See Reorganization Plan No. 7 of 1961, 26 Fed. Reg. 7315. Most of the references in this opinion will be to the Board, but this should be considered as including the Commission, where appropriate.

<sup>2</sup> No. 15,330 was originally held in abeyance pending the outcome of *Grace Lines, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961), a similar case.

directing Flota to pay Consolo some \$143,370.98 as reparations for the conduct condemned in the order of June 22, 1959. In No. 16,366, Consolo challenges the award of March 30, 1961, as inadequate.<sup>3</sup>

[fol. 742]

# I.

We will take up first the issues presented in No. 15,330. The background of the controversy may be briefly stated. The Grace Line, another steamship company, offered a year-round regularly-scheduled weekly service to North Atlantic ports with vessels containing refrigerated ("reefer") cargo space suitable for carrying bananas. Flota offered a generally similar service. In a proceeding against the Grace Line, the Maritime Board ruled that under the Shipping Act that line was a common carrier, and must offer refrigerated space to all qualified banana shippers. *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615 (1959), aff'd sub nom. *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961); see also *Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 (1953). Since that ruling, Grace has carried bananas for a number of shippers. Flota, however, has carried bananas since 1950 under special contracts giving the contracting shippers the exclusive use of Flota's refrigerated facilities. In August 1957, following the Board's first decision in the *Grace* cases, Consolo made a written demand on Flota for a fair share of Flota's refrigerated space. This was refused. On October 30, 1957, Flota filed a petition with the Board for a declaratory order determining whether or not Flota was required to cancel its existing contracts for banana shipment. On November 15, 1957, Consolo filed his complaint. *Banana Distributors*, a banana shipper similarly situated, filed its complaint thereafter. The three proceedings—the petition for a declaratory order and the two complaints—were consolidated for hearing.

<sup>3</sup> Flota is petitioner in No. 16,369, as well as in No. 15,330, and intervenor in No. 16,366. Consolo is petitioner in No. 16,366, and intervenor in No. 15,330. *Banana Distributors*, an independent importer of bananas which is in substantially the same position as Consolo, is also an intervenor in No. 15,330.

[fol. 743] At an early stage, the Examiner ruled that he would defer the taking of evidence on the measure of reparation due the complainants until after the merits of the complaints were decided. The merits were determined in Consolo's favor by order of the Board dated June 22, 1959, and it is this order which Flota seeks to have reviewed in No. 15,330. At a proceeding commenced after the decision on the merits, evidence of damages was taken, and the Board entered a Report and Order on March 28, 1961, directing Flota to pay Consolo \$143,370.98 in reparations.

The threshold question in No. 15,330 is whether the Board could properly find, as it did, that Flota violated Section 14 Fourth and Section 16 First of the Shipping Act of 1916.<sup>4</sup> Flota argues that the issue whether it had [fol. 744] violated these sections of the Act was not properly before the Board when the latter rendered its Report and Order of June 1959. The Board's Examiner had ruled, as we have seen, that the proceeding would be heard in two

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<sup>4</sup> Section 14 of the Shipping Act of 1916, 46 U.S.C. § 812, provides in part as follows:

"No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

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"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage . . . ."

Section 16 of the Act, 46 U.S.C. § 815, provides in part:

"It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

phases. In essence, Flota contends that the first phase was concerned only with the question whether or not Flota was a common carrier of bananas, and that all remaining issues, including the crucial question whether Flota was in violation of the Shipping Act, were reserved for the subsequent proceeding.<sup>5</sup> As a corollary, Flota claims that in the first proceeding it was deprived of a proper hearing on the question of violation of the Act because it put on complete testimony only with respect to the common carrier issue.

The literal language used in making, and granting, the motion for a severance of the hearing can probably be read in such a way as to lend some support to Flota's contention. Thus, counsel for Banana Distributors, in moving to sever, said "we would like an immediate decision . . . on the question of whether or not the Grancolombiana Line is a common carrier" and "if the Grancolombiana Line is found not to be a common carrier, that would end the case." The Board explains this language by saying that the term "common carrier issue" was a kind of oral shorthand for the concept of violation of Flota's duties as a common carrier under the Shipping Act.

[fol. 745] Be that as it may, a careful reading of the record leads us to the conclusion that the only matter removed from the first proceeding was the question of the quantum of damages, not the issue of violation of the Shipping Act. Such in our view must or should have been the understanding of all parties, including Flota. In granting the motion to sever, the Examiner stated: "We ought to proceed with the merits." It is difficult to imagine the "merits" as excluding the issue of whether Flota had violated the Act. And in requesting separation, counsel for Banana Distributors spoke only of "our damage case" and "the dam-

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<sup>5</sup> Console argues that Flota is making this argument for the first time before this court. But in its Request for Oral Argument and Exceptions to the Examiner's recommendation, Flota said: "5—Flota excepts to the finding that it violated Sections 14 Fourth and 16 First of the Act on the further ground that such a finding was without the scope of the proceedings."

age part of this proceeding" as belonging in the second stage of the hearings. Moreover, counsel described the motion to sever as "a severance of the proceeding just like was done in the Grace Line case." It seems to us that the parties must have understood this as a reference to the closely similar and very recent *Grace* case, in which the common carrier and violation issues were treated together.<sup>6</sup> Similarly, in two earlier Board cases which involved separated proceedings, only the question of the extent of the damages was left to the second hearings. See *Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft*, 1 U.S.M.C. 686 (1937), 2 U.S.M.C. 62 (1939), aff'd, 116 F.2d 849 (2d Cir. 1941); *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 U.S.M.C. 131 (1949). [fol. 746] In moving for a severance, counsel for Banana Distributors clearly informed the Examiner and other counsel that his purpose was to "get on the Grancolombiana Line ships as promptly as possible." Given that purpose, it would have been pointless to restrict the case to the sole inquiry whether petitioner was a common carrier. For even if Flota were found to be a common carrier, this in itself would not get Consolo on Flota's boats if Flota's denial of space to Consolo was not an "unjust" or "unreasonable" discrimination.

Our conclusion that Flota should have known that the question of its violation of the Act was in issue is borne out by indications that Flota did in fact know this. In its own

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<sup>6</sup> Numerous statements by counsel for Flota throughout the proceedings unmistakably indicate that Flota understood "the Grace Line case" to be the 1959-60 litigation. Questions of statutory violation were treated in the first half of the Grace proceeding, and were reviewed—and the Board ultimately affirmed—by the Court of Appeals for the Second Circuit in *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (1960), while the issue of the quantum of reparation had been deferred for further Board proceedings.

<sup>7</sup> It may be noted that the Shipping Act itself, at Sections 29 and 30, recognizes a distinction between Board orders requiring the payment of money and other orders. See 46 U.S.C. §§ 828, 829 (1958); 46 C.F.R. § 201.251 (1958).



brief to the Examiner, Flota recognized that the legality of its conduct was in question. It argued that "denial of space violates the Shipping Act only if it constitutes an unjust discrimination between competitors." It concluded its brief by arguing that its contracts "do not violate Section 16, First or Section 14, Fourth of the Shipping Act, 1916."

Finally, in its presentation of evidence and argument below, Flota went far beyond the "common carrier" question. It contended before the Examiner that even if it was a common carrier, it could not as a practical matter offer its refrigerated space on a non-discriminatory basis. It also argued that complainants had not shown that they were prejudiced or unjustly discriminated against because, according to petitioner, they had failed to show that they were competitors of Panama Ecuador, the favored shipper. Flota's presentation of its case in the first phase of the hearing is inconsistent with the position it now advances.\* [fol. 747] We conclude that the Board properly had before it the issue whether Flota had violated the Shipping Act.

We turn to the Board's findings that Flota was a common carrier, and that it had violated Section 14 Fourth and Section 16 First of the Shipping Act. Flota argues that it was not a common carrier of bananas. But Flota as to most commodities is admittedly a common carrier by water,

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\* At no point in the first hearing was Flota prevented from putting on any evidence it desired relevant to the issue of violation of the Act. Not until its reply brief before this court did Flota seek to explain with any degree of specificity what facts it would have offered that it did not actually present in the first hearing. Flota argues that if it had known that the question of its violation of the Act was in issue in the first proceeding, it would have then put on certain evidence which it actually put on only in the reparations hearing. The evidence referred to in Flota's reply brief primarily goes to support Flota's contention that Consolo really did not need reefer space on Flota's vessels. This may be relevant to show mitigation of damages. But it would be of doubtful value in justifying Flota's discriminatory refusal to carry bananas for anyone other than the favored shipper. Flota has at no time suggested that it has any other evidence available.



and maintains a regularly scheduled and advertised cargo service between the west coast of South America and various ports in the United States. With the sole exception of bananas, which Flota regularly carries on the same vessels as other goods, Flota has carried cargo without discrimination, and without asserting a right to pick and choose among qualified shippers. But Flota charges the Board with error because the Board should have made "a finding as to petitioner's status in the carriage of bananas, without regard to its status in the carriage of other commodities not employing its reefer facilities." However, this precise argument was rejected in *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960)—a decision with which we agree.<sup>9</sup> Flota began its defense [fol. 748] before the Board by "assuming that the Grace Line decision [of the Board] is good, valid law, and we are not attacking that in any manner, shape or form." Flota sought to avoid the effect of the *Grace Line* cases by showing that Flota's operations and vessels were substantially different from those of the Grace Line. The Examiner and the Board took extensive evidence and considered this question at great length. The Board concluded: "The arguments relating to the differences between Flota's vessels and Grace's vessels are not impressive. . . . Operational difficulties and vessel limitations do not justify prejudice and discrimination otherwise undue and unreasonable." 5 F.M.B. at 639. We believe this finding by the Board to be adequately supported by the record.

Finally, Flota contends that the Board did not consider the reasonableness of Flota's actions, did not make a finding with respect thereto, and could not on the record have

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<sup>9</sup> Judge Hand went even further than it is necessary for us to go in this case. He indicated that a company's "status in the carriage of other commodities" was not only relevant, but might be determinative. "[T]here is every reason of declared policy to assume that the term [common carrier] was used to include all those who were to some degree 'common carriers.'" 280 F.2d at 792. Cf. *Louisville & Nashville R. Co. v. United States*, 282 U.S. 740 (1931); *Consolo v. Grace Line, Inc.*, 4 F.M.B. 293 at 300.

found that Flota acted "unjustly" or "unreasonably." But the Board's report said in explicit terms "We find no justification for this conduct on the part of Flota . . . ." As we have pointed out, the Board rejected Flota's argument that structural differences between Flota's ships and Grace's justified Flota's discrimination. It also rejected Flota's attempted justification based on vessel scheduling and shipper convenience. It ordered that space be made available to shippers on a "fair and reasonable basis." It noted that an appropriate forward-booking system would be just and reasonable, "as opposed [fol. 749] to 'unjust' and 'unreasonable' which aptly describes the present system." Under the circumstances, we think it beyond question that the Board considered and made sufficient findings as to the reasonableness of Flota's conduct.

The Board's findings are supported by the record. Flota argues that it acted reasonably in refusing space to Consolo because Flota already had an exclusive contract with another shipper, Panama Ecuador, and because it sought to ascertain the legality of its conduct by petitioning the Board for a declaratory order. But the making and performance of the exclusive contract comprised the very conduct which constituted violation of the Act. Flota discriminated by favoring Panama Ecuador over Consolo—just as in the *Grace Line* case the carrier had made special contracts with favored shippers and had declined to serve others. Nor does Flota's action in petitioning for a declaratory order automatically excuse what would otherwise be a violation of the Act. Allowing the Board that measure of discretion due to it because of its expertise and status as an administrative agency, we think it was entitled to conclude that neither the exclusive contract nor the request for a declaratory order rendered Flota's discriminatory refusal of space reasonable or just.

The Board's order of June 22, 1959, challenged in No. 15,330, will accordingly be affirmed.

## II.

We turn now to the petitions in No. 16,366 and No. 16,369, dealing with the question of reparations.

*Jurisdiction.* Consolo has moved to dismiss Flota's petition in No. 16,369 for lack of jurisdiction, urging that this court cannot review orders awarding reparations, on petition of the party charged. Flota and the Board resist the motion, alleging that this court possesses jurisdiction to entertain the petition under the Administrative Orders Review Act of 1950 (the Hobbs Act), 5 U.S.C. [fol. 750] § 1031 *et seq.* The Hobbs Act gives the courts of appeals exclusive jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" such final orders of the Federal Maritime Board as "are now subject to judicial review" pursuant to Section 31 of the Shipping Act, 46 U.S.C. § 830. Section 31 in turn provides that the venue and procedure in suits to enforce, suspend, or set aside any order of the Federal Maritime Board shall, "except as otherwise provided," be the same as in similar suits in regard to orders of the Interstate Commerce Commission. The relevant statutory provisions regarding I.C.C. orders are contained in 28 U.S.C. §§ 1336, 2321-25. Section 1336 states:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Since Section 1336 gives the District Courts broad jurisdiction to "set aside" I.C.C. orders, and the procedure for Federal Maritime Board cases is similar by virtue of Section 31, the jurisdiction to set aside final orders of the Federal Maritime Board formerly possessed by the District Court under Section 31 of the Shipping Act appears to have been transferred to this court by the Hobbs Act.<sup>10</sup>

<sup>10</sup> Sections 2321-25 of Title 28 of the Code (formerly contained in the Urgent Deficiencies Act), and a number of cases cited by

[fol. 751] Our jurisdiction to review No. 16,366, in which Consolo attacks the reparations granted as inadequate, was not challenged. We agree that the case is properly here. Cf. *D. L. Piazza Co. v. West Coast Line*, 210 F.2d 947 (2d Cir.), cert. denied, 348 U.S. 839 (1954). If we are obliged to review the order at the complainant's instance, it would be anomalous if we could not review it at the instance of the party it holds liable. Once here, the order should be reviewable in its entirety, and the rights of all parties considered. Cf. *Inland Steel Co. v. United States*, 306 U.S. 153, 157 (1939).

We are well aware, however, that the jurisdictional problems in these cases are not free from doubt and difficulty. The Hobbs Act and Section 31 of the Shipping Act do not in terms purport to give us authority to render a money judgment based on a Board order awarding reparations, or to enforce any order of the Board. If a carrier chooses not to obey an order of the Board for payment of reparations, even after affirmance by this court, it may be that to obtain enforcement the complainant would be forced to go into the District Court in a suit under Section 30 of the Shipping Act, 46 U.S.C. § 829. The defendant in such a Section 30 suit would be free to demand a jury trial and to introduce evidence not previously before the Board. In the trial the order and findings of the Board would, by the terms of the statute, be given only prima

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Consolo, such as *Brady v. Interstate Commerce Commission*, 43 F.2d 847, 852 (N.D. W.Va. 1930), *aff'd per curiam on other grounds*, 283 U.S. 804 (1931), deal largely with the procedural question whether a reparations order of the Interstate Commerce Commission is reviewable by a three-judge district court or a single judge court. Cf. *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949). Congress, in passing the Hobbs Act, could hardly have intended to retain this distinction, with respect to Maritime Board orders. We note, also, that Section 31 specifically refers to suits to "enforce, suspend, or set aside" Board orders; the Hobbs Act adds to this by including suits to determine the validity of such orders, but subtracts from it by omitting any reference to their enforcement.

facie effect. The ultimate result reached in the District Court might vary considerably from the Board's order.<sup>11</sup> [fol. 752] Conceivably, a jury might find the carrier to be free of any liability whatever. And any final judgment rendered could be appealed to the appropriate court of appeals, which might not be the same one which had reviewed the order in the first instance. A strong argument can be made that only one review should be permitted, and that we should not undertake to review the Board's reparations order at the present stage, in any respect. We have considered these difficulties in reaching our conclusion. But we think it clear that Congress intended, in the Hobbs Act, to clarify and simplify the review situation as much as possible, rather than to perpetuate distinctions between awards, denial of awards, and other Federal Maritime Board actions, unless such distinctions are inevitable. See H.R. Rep. No. 2122, 81st Cong., 2d Sess. 3 (1950); cf. *Pennsylvania R. Co. v. United States*, 363 U.S. 202 (1960); *D. L. Piazza Co. v. West Coast Line, Inc.*, *supra*. We think that Congress intended us to review reparations orders, at least to the extent necessary "to determine the validity" of such orders on appropriate petition, and that it is our duty to do so.

The scope of our review in Nos. 16,369 and 16,366 also presents difficulties. Questions of law, such as matters of jurisdiction and fair administrative procedure, are obviously for our determination. Cf. *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U.S. 541, 547 (1912). But in reviewing the evidence, we are confined to a much more restricted standard, as the Administrative

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<sup>11</sup> We do not, of course, wish to minimize the res judicata effect of our decision. See *In re Federal Water & Gas Corp.*, 188 F.2d 100 (3d Cir. 1951), *cert. denied sub nom. Chenery Corp. v. Securities and Exchange Commission*, 341 U.S. 953 (1951). Our determination of the issues dealt with in No. 15,330, for example—such as the issue as to whether or not Flota violated the Act—is undoubtedly binding on Flota and the other parties. Flota chose to come to this court—it cannot reject our decision.

Procedure Act, §§ 1 et seq., 5 U.S.C. §§ 1001 et seq. (1958), and a long line of Supreme Court decisions, clearly indicate. See, e.g., *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951); *United States v. [fol. 753] Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942). We have examined the appeals from the reparations award with these considerations in mind.

*The Merits.* In No. 16,366, Consolo seeks additional reparations. He questions the Board's denial of pre-judgment interest. But the cases cited by Consolo, such as *Louisville & N.R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U.S. 217 (1925), only demonstrate that recovery of interest is not barred, not that the granting of interest is mandatory. We find that the Board did not abuse its discretion in denying interest. Cf. *Dorsett v. Shore*, 254 F.2d 373, 377 (4th Cir. 1957); *Miller v. Robertson*, 266 U.S. 243 (1924); *Board of County Comm'rs of the County of Jackson v. United States*, 308 U.S. 343 (1939).<sup>12</sup> Consolo also claims reparations from the time he first demanded space. The Board calculated the reparations from the time Consolo first demanded an *allotment* of space. Prior to that time, he was unsuccessfully bidding for an exclusive patronage contract for Flota's entire reefer space. This is exactly the kind of exclusive contract which Consolo now claims was illegal and damaging to him. Under these circumstances, we think the Board was reasonable in declining to begin the reparations period at an earlier date than the time Consolo first attempted to secure a fair and equitable portion of space. Finally, Consolo, like Flota, is dissatisfied with the 18.46% of the total computed net profit awarded to Consolo. Flota says Consolo should only have received 15.58% since this is the only amount of space *it says* it would have given him. Consolo wants 33⅓%, arguing that there were only three qualified ship-

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<sup>12</sup> For similar reasons, we reject Flota's argument that the Board's award of interest on "amounts unpaid after 60 days," from March 30, 1961, was erroneous.

pers during the reparation period, and hence he should have been allocated one-third of Flota's banana space. [fol. 754] Yet it hardly seems reasonable to say that all qualified shippers must be given equal space, regardless of the applicant's size, facilities, financial position, and ability to arrange for the loading and discharging of the cargo. The Board's selection of 18.46% was based on an allotment to and use by Consolo of that percentage of the cubic capacity of Flota's ships on the United States Atlantic run in actual practice over a period of time. Perhaps the Board might have chosen a better yardstick. Perhaps not. We are surely unable, however, to say that the Board's choice was arbitrary or unreasonable. We therefore find no merit in Consolo's petition in No. 16,366.

In No. 16,369, Flota seeks to avoid the payment of reparations primarily by arguing that it did not violate the Shipping Act. To the extent that a number of its contentions in this regard have already been dealt with in our consideration of No. 15,330, we will not repeat them here.

Flota makes a number of additional arguments.<sup>13</sup> It first claims that there was no proof or finding of actual competition between Consolo and Panama Ecuador. But though the express words "we find competition existed" are not employed, the entire decision of the Board is implicit with the finding of such competition. For example, the Board repeatedly refers to the fact that "Panama Ecuador, in receiving and using that space [of Flota], was favored and advantaged." 5 F.M.B. 638-39. And the Board explicitly speaks of Flota denying space "to a qualified competitor." 5 F.M.B. 639. In context, the word

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<sup>13</sup> Flota also argued that the Board misconstrued its function vis-a-vis the Examiner. The statement of the Board upon which this connection is based has been taken out of context as quoted in Flota's brief. Neither other statements by the Board nor its actions will support Flota's claim in this regard. The argument that Consolo's claim for reparation was untimely is similarly without merit.



"competitor" clearly refers to Consolo, in relation to [fol. 755] Panama Ecuador.<sup>14</sup> Moreover, granting to the Board the right to draw reasonable inferences, we believe that there is sufficient evidence in the record to support a finding of competition, especially since Consolo and Panama Ecuador were both dealing in exactly the same commodity at the same time, were both "independents," and both shipped extensively to many of the same seaports.

One of Flota's principal arguments, however, was and is that the Board erred in failing to hold that it would be inequitable to award reparations to Consolo. Flota marshaled substantial evidence in support of its contention. It pointed to the unsettled nature of the law in the field, as illustrated by the fact that the Second Circuit in the first *Grace Line* case reversed the Board's order and remanded it, concluding that the legal theory adopted by the Board was erroneous. 263 F.2d 709 at 711. In the second case (which was not decided until July 1960), the majority agreed with the Board's new approach to the case, but Judge Moore filed a strong dissent, 280 F.2d 790. At the hearing in this case, Flota advanced evidence of factual differences between its situation and that of the *Grace Line*. While this would not necessarily justify Flota's conduct, it might well lead to the conclusion that Flota in good faith believed that the *Grace Line* case was distinguishable. Flota also complained, with some justification, of the two-year delay of the Board in rendering a declaratory order.<sup>15</sup> Moreover, Flota already had signed

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<sup>14</sup> The Board also noted Flota's exception No. 16 to the Examiner's failure to make a finding of competition between Consolo and Panama Ecuador. The Board found that "the 16th exception is unsupported by the record."

<sup>15</sup> Flota clearly indicated at the first hearing that it would obey any order rendered by the Board. Flota upon the issuance of the Board's order complied with it. Thus, a prompt declaratory order would have served a primary purpose envisaged for it under the Administrative Procedure Act—to assist a party in governing its conduct without rendering itself liable to suit. See Administrative



[fol. 756] an exclusive contract with Panama Ecuador covering what may well have seemed to be, in the light of the Board's decision in the *Banana Distributors* cases, 5 F.M.B. 278 (1957), and 5 F.M.B. 615 (1959), a reasonable period of time. By granting space to Consolo and other shippers when first requested, Flota might have opened itself to possible liability for breach of the contract with Panama Ecuador, at least in the absence of a declaratory order from the Board. Finally, Flota pointed out the difficulties and delays in loading which would result if more than one shipper were to use Flota's refrigerated space, and Consolo's apparent failure to utilize all of the space available to him on Grace Line vessels. The Board took up most of these points individually and disposed of them briefly.<sup>16</sup> But the essence of Flota's argument was that the cumulative weight of all the circumstances, and not any one circumstance, rendered it inequitable to require reparations. We are not prepared, on appeal, to go this far; but we do consider, in light of the Board's decision and the damages it imposed, that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to grant [fol. 757] reparations once it found a violation of the Act,<sup>17</sup> or (2) that all of the issues as to the reasonableness or equity of Flota's conduct were determined in the first phase

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Procedure Act § 5(d), 5 U.S.C. § 1004(d) (1958). The result here is that the Board is making Flota pay reparations for the period of the Board's delay.

<sup>16</sup> The Board's holdings as to its delay in rendering a declaratory order, and as to the Panama Ecuador contract, were in effect conclusionary rejections of Flota's arguments. The Board answered Flota's contention that the law was unsettled by assuming that the law was settled by the Grace Line cases, a doubtful assumption at that stage. Finally, the Board felt that the operational difficulties of multiple loadings could be overcome by "the ingenuity of practical men." But Flota suggests that later events have shown that the Board was mistaken.

<sup>17</sup> Section 22 of the Shipping Act provides only that the Board "may" direct the payment of reparation. 46 U.S.C. § 821 (1958).

of the proceeding.<sup>18</sup> In any case, we shall remand to the agency to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.<sup>19</sup>

The Board's order of June 22, 1959, challenged in No. 15,330, is affirmed; the order of March 30, 1961, challenged in Nos. 16,366 and 16,369, is set aside, and the matter remanded to the agency for further proceedings not inconsistent with this opinion.

*So Ordered.*

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<sup>18</sup> We have concluded that the Board could properly find after the first hearing that Flota had violated the Act. But this does not mean that the circumstances of its violation could not be examined at the second hearing in an effort to reach a fair conclusion as to whether any reparations should be assessed.

<sup>19</sup> Our disposition of the case makes it unnecessary for us, at least at this time, to consider the remaining issues raised on this appeal. Thus, should the Board decide, on remand, that a different measure of reparations is warranted, Flota's arguments as to the calculation of damages might be rendered moot.

[fol. 758]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 15,330

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents,

PHILIP R. CONSOLO, BANANA DISTRIBUTORS,  
INC., Intervenors.

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No. 16,366

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

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No. 16,369

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

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[File endorsement omitted]

On Petitions for Review of Orders of the Federal Maritime Board, now Federal Maritime Commission.

Before: Wilbur K. Miller, Chief Judge, and Bazelon and Washington, Circuit Judges.

JUDGMENT—April 26, 1962

These cases came on to be heard on the record from the Federal Maritime Board, now Federal Maritime Commission, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court:

(1) that the order dated June 22, 1959, on review in case No. 15,330 is affirmed; and

(2) that the order dated March 30, 1961, on review in cases Nos. 16,366 and 16,369 is set aside, and these proceedings are hereby remanded to the Federal Maritime Commission for further proceedings not inconsistent with the opinion of this court.

Per Circuit Judge Washington.

Dated: April 26, 1962.

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[fol. 759]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. No. 18230

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FLOTA MERCANTE GRANCOLOMBIANA, S.A., 79 Pine Street,  
New York 5, New York, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents.

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[File endorsement omitted]

## PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL MARITIME COMMISSION—Filed November 14, 1963

This is a petition to review a final order of the Federal Maritime Commission (the "Commission") pursuant to the opinion and order of remand by this Court dated April 26, 1962 (*Flota Mercante Grancolombiana v. Federal Maritime Com'n*, 302 F.2d 887, 896-97) (C. A. Nos. 15,330, 16,366 and 16,369). The Commission's order subject of this petition for review, was dated September 16, 1963 and served September 18, 1963, and was amended by an "Errata Sheet" dated October 9, 1963. The Commission therein directed petitioner Flota Mercante Grancolombiana, S.A. ("Flota") to pay to Philip R. Consolo "on or before 60 days from the date hereof, \$106,001.00, with interest at the rate of 6% per [fol. 760] annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916". A copy of the Commission's order and report served September 18, 1963, and "Errata Sheet" of October 9, 1963, both under designation of FMB Docket No. 827 (Sub. No. 1), are attached hereto as Exhibits 1 and 2.<sup>1</sup>

## Jurisdiction and Venue

This Court has jurisdiction to review this action of the Federal Maritime Commission under the Judicial Review Act of 1950, 5 U.S.C. § 1031 *et seq.* Venue is placed under 5 U.S.C. § 1033.

## The Nature of the Proceeding

1. For a number of years, Flota, a steamship company, has provided freight service between United States North Atlantic ports and Ecuadorian ports. Flota's vessels have

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<sup>1</sup> The earlier reports of the Commission's predecessor, the Federal Maritime Board (the "Board"), dated March 28, 1961, served March 30, 1961; (6 FMB 262) and dated June 22, 1959 served June 29, 1959, (5 FMB 633) are on file with this Court in Civil Action Nos. 15,330, 16,366, and 16,369 (consolidated) which culminated in the remand order of April 26, 1962, referred to above.

a limited amount of reefer (refrigerated) space, in one hold, in which it carried sporadic shipments of bananas to the United States from February 1950 until mid-1955. In accordance with long-standing practice, all such bananas were carried under written agreements; in each instance there was only one shipper on each vessel.

In July 1955, Flota entered into a contract with Messrs. Morey and Staff, for a lease of Flota's reefer space for a period of two years, plus an option for three additional years. That contract reserved to Flota the right to terminate the contract on seven days' notice, if any portion should be declared invalid. \* \* \*

\* \* \* \* \*

[fol. 761]

### Grounds on Which Relief Is Requested

The Commission committed prejudicial error in each of the following respects:

1. The record compelled a finding that under all the circumstances, including the unsettled law and the Board's delay in acting on Flota's request for declaratory relief, it would be inequitable to force Flota to pay reparations. The Commission's conclusions as to "the individual and cumulative effects of the factors mentioned by the Court as they bear on the equities", and the Commission's accompanying reasons and findings, are inconsistent with the Court's opinion and findings, and in violation of the Court's order of remand; they are also factually inaccurate and incomplete in material respects, not supported by substantial evidence, and contrary to the record. Moreover the Commission did not consider or make findings with respect to "all the circumstances" demonstrating the inequity to Flota of forcing Flota to pay reparations (including but not limited to those set forth above), and it failed to consider or [fol. 762] make findings with respect to any of the circumstances called to its attention by Flota which demonstrated the lack of countervailing equities in Consolo's favor and that award of reparations to him would be in the nature of an unjust enrichment. In connection with this issue, Flota had no "duty to offer the space and give the shippers

the chance to devise cooperative means of using it", under the circumstances, absent prior arrangements by interested shippers to cooperate, communicated to Flota, with the appropriate undertakings and guarantees to Flota.

2. The record also compelled a finding that under all the circumstances it would be inequitable to force Flota to pay reparations calculated under the harsh measure of damages utilized by the Board and Commission. In this connection the Commission also erred in each of the respects set forth in the foregoing paragraph. Its finding that "Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith . . ." is contrary to the Court's finding and order of remand; is not supported by substantial evidence; and is contrary to the record. The Commission also erred by holding in effect that even if it accepted Flota's contentions as to the equities it was unable to devise a method to give effect thereto. It further erred by weighing against Flota the fact that the amount of its award "has been successively reduced so that it is now substantially less than half the amount the Examiner awarded Consolo several years ago".

3. The measure of damages employed by the Commission likewise is not the lawful and proper measure of damages for the particular statutory violations with which Flota was charged.

[fol. 763] 4. The Commission made no findings as to the character, intensity and effect of the competitive relationship between Consolo and the allegedly preferred shipper Panama Ecuador (as distinct from the fact of existence of a competitive relationship), did not consider this issue, and could not upon the record before it find proof thereof sufficient to sustain an award of reparations.

5. The Commission erred in failing to find that Consolo's claimed damages were hypothetical and speculative.

6. If Philip R. Consolo suffered any damages at all, it is impossible to determine through the maze of intercorporate transactions by which he imported bananas, the total

costs actually involved, what profits, if any, were lost by Consolo himself, as distinguished from corporations in which he had only a partial (or no) interest, and who, if anyone, was the proper claimant for damages. The Board's Examiner erred in refusing to permit Flota to inquire into these matters; and the Commission erred in denying Flota's request that the record be reopened. The Commission did not even mention, much less make findings or proper conclusions with respect to these matters.

7. If its measure of damages were appropriate, the Commission erroneously overstated the award, to Flota's prejudice, including in the following respects:

(a) The Commission in its calculation erroneously employed cost data representing not Panama Ecuador's cost of bananas as the Commission stated, but the cost of bananas imported from different and lower cost banana areas under Consolo's contract on Grace Line.

[fol. 764] (b) The Commission properly stated that the ocean freight rate to be employed in calculating reparations was that "actually charged by Flota when advertising space to several shippers", but in fact it erroneously disregarded or overlooked the minimum guarantee provisions of that rate.

(c) The Commission's reparations calculations improperly assumed, without supporting evidence or explanation, and contrary to the earlier recommendation of the Examiner, that if Consolo had had space on Flota's vessels to Philadelphia, Consolo could have obtained a lower stevedoring rate in Philadelphia than Consolo actually obtained in New York, and that Consolo would have negotiated as low a stevedoring rate in Philadelphia to unload only a partial cargo of bananas as Panama Ecuador was able to negotiate with the stevedores to unload the entire banana space and hence a much larger volume of bananas.

(d) The Commission should have reduced if not entirely eliminated the reparation period, for the period during which the law was unsettled.



(e) It should have reduced the reparations period to reflect delays for which the record compelled a finding that the Board, its Examiner, or the complaining shippers (including Consolo) were responsible.

(f) It should have excluded reparations for the period prior to November 15, 1957, because (1) that was the date by which Consolo demanded space, and (2) the Commission's order was entered only in Docket No. 827 (Sub. No. 1) in which Consolo sought damages only for the period beginning November 15, 1957.

8. The Commission erred in not finding that Consolo had a duty to mitigate damages and failed in that duty, including in the following respects:

[fol. 765] (a) He had one or more contracts with Grace Line throughout the reparations period but permitted Dover Banana Company in which he had only a minority interest to use the entire space. The Commission did not consider or even mention this issue but assumed contrary to the record that Consolo himself used the space in fact used by Dover Banana Company.

(b) Even Dover Banana Company did not use all the space under Consolo's contract with Grace Line. The Commission's statement that the award reflects this consideration is not correct.

(c) Consolo made no effort to charter suitable vessels although they were available. The Commission's statement that it would have been a hardship for him to charter ships is not supported by the record. Flota in fact made prima facie showing of availability of suitable vessels which Consolo never sought to rebut.

(d) Consolo did not use any space on the Chilean Line, available in the May to December season, except for about five shipments in late 1958.

9. Having found that Consolo sought to mitigate damages to the extent of making certain shipments on the Chilean Line late in 1958, the Commission thereafter erro-

neously failed to make a commensurate reduction in the reparations award.

10. The Commission erred in denying Flota's petition to reopen the record for the taking of additional evidence as to later events referred to by the Court and the additional matters referred to in Flota's petition to reopen.

11. The Commission did not comply with its minimum obligation under Section 8(b) of the Administrative Procedure Act to include in its decision "a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record".

### Relief Sought

Petitioner respectfully prays that this Court:

1. Find that the Commission erred in the foregoing respects, and set aside and finally cancel the Commission's report and order served September 18, 1963 as amended, or remand the proceeding to the Commission with a direction that it dismiss the complaint and discontinue the proceeding;

2. In the alternative, if the Court does not set aside and cancel the order in entirety, that it set aside and cancel so much thereof as is necessary or appropriate to correct specific errors referred to above, and remand this proceeding to the Commission for reconsideration of the remaining issues in a manner consistent with the Court's opinion and findings; and

3. Grant such other and further relief as the Court may deem appropriate.

Respectfully submitted,

Odell Kominers, J. Alton Boyer, 529 Tower Building,  
Washington, D. C. 20005, Attorneys for Petitioner  
Flota Mercante Grancolombiana, S.A.

November 14, 1963

[fol. 767]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
No. 18235

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PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents.

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PETITION FOR REVIEW—Filed November 15, 1963

1. This is a Petition for Review of a portion of an order of the Federal Maritime Commission ("the Commission") insofar as such order denied petitioner the full relief sought. The Commission's order was entered under the Shipping Act, 1916, 46 U.S.C. 801, *et seq.*, and is reviewable under 5 U.S.C. 1031 ff. This Court has jurisdiction under 5 U.S.C. 1032. Venue is in this Court under 5 U.S.C. 1033. The United States of America is named as a respondent under 5 U.S.C. 1034. The Commission is named as a respondent under Rule 38(a) of this Court.

\* \* \* \* \*

[File endorsement omitted]

[fol. 768]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
C. A. No. 18230

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FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents.

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SUPPLEMENT TO PETITION FOR REVIEW—Dated December 6,  
1963 and filed January 6, 1964

Petitioner Flota Mercante Grancolombiana, S.A. hereby  
supplements its Petition For Review, filed November 14,  
1963, as follows:

Add the following new paragraph to page 8, following  
the last sentence of paragraph 10, under the heading "The  
Nature of the Proceeding":

"11. One or more members of the Commission's  
staff, including the Commission's General Counsel and  
Acting General Counsel engaged in the performance  
of prosecuting functions in the earlier proceedings in  
this and factually related cases, and thereafter par-  
ticipated and advised the Commission in the Commis-  
sion's meetings and decision and order subject of this  
Petition for Review, as disclosed by the Commission's  
official minutes required to be kept pursuant to Section  
[fol. 769] 201(c), Merchant Marine Act, 1936, subject  
to judicial notice by this Court. Further, those min-  
utes disclose that such members of the Commission's  
staff prepared a proposed report and order which the  
Commission thereafter issued as its own, without first  
disclosing their existence and without affording peti-

tioner an opportunity to submit exceptions thereto and supporting reasons for such exceptions."

Add the following new paragraph to page 13 following paragraph 11, under the heading "Grounds on which Relief is Requested":

"12. By the actions alleged in paragraph 11, under the heading 'The Nature of the Proceeding', the Commission violated Sections 5(c), 3(a), 7 and 8 of the Administrative Procedure Act, and its Order is accordingly void."

Respectfully submitted,

Odell Kominers, J. Alton Boyer, Attorneys for Petitioner, Flota Mercante Grancolombiana, S.A.

December 6, 1963  
529 Tower Building  
Washington, D. C. 20005

[File endorsement omitted]

[fol. 770]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C. A. No. 18230

C. A. No. 18235

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FLOTA MERCANTE GRANCOLOMBIANA, S. A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents.

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PREHEARING STIPULATION—Filed December 16, 1963

The parties to the above proceedings Flota Mercante Grancolombiana, S. A., (petitioner in No. 18230 and intervenor in No. 18235); Philip R. Consolo, (petitioner in No. 18235 and intervenor in No. 18230); and respondents Federal Maritime Commission and United States of America (in both proceedings), by their respective attorneys, hereby stipulate as follows:

1. The parties will (and hereby do) jointly request the court to consolidate the above proceedings.

2. *Questions Presented.*

Counsel have conferred regarding stipulation of the issues herein, but have failed to reach agreement.

(a) Flota Mercante Grancolombiana, S. A., states the issues in case Nos. 18230 and 18235 as follows (upon the assumption they will be consolidated):

[fol. 771] "Where this Court had previously found 'substantial evidence' supporting petitioner's [Flota's] contentions that it would be inequitable to force it to pay reparations for violations of the Shipping Act, had set

aside a reparations order against Flota, and had directed the Federal Maritime Commission 'to consider whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board':

"1. Whether the Commission erred in thereafter finding, contrary to the Court's findings, that there was no equity whatever in Flota's contentions; in refusing to permit further evidence, and in reinstating the principal portion of the vacated award, under the same measure of damages; whether it failed to consider and make findings upon all relevant circumstances and issues; and whether its findings, rulings, and conclusions are supported by substantial evidence, consistent with law, and sufficient to sustain its ultimate conclusions.

"2. Whether the preparation of the Commission's Report and Order and participation in the Commission's private meetings, by the same attorneys who had earlier contended to this Court that Flota had violated the Shipping Act and should be forced to pay reparations, and by their subordinates, and the failure to disclose these facts and to permit Flota to except to their undisclosed proposed report and order, violated sections 5(c), 3, 7, and 8 of the Administrative Procedure Act or deprived Flota of fair administrative procedure.

[fol. 772] "3. Whether the Commission overstated the reparations award, by understating costs, overstating the length of the reparations period, and failing to make proper findings upon the issue of mitigation of damages.

"4. [In case no. 18235], whether the Commission erred in reducing the former award in two respects and in denying the shipper's claim for prejudgment interest.

(b) Petitioner Philip R. Consolo states the issues as follows:

When the Federal Maritime Commission had found that a common carrier by water had illegally excluded a shipper, did the Commission err in awarding reparation (in a second award after a remand from this court)

- (1) By computing the reparation award based on a freight rate in effect after the period of exclusion rather than using as a basis the freight rate actually in effect during the period of exclusion;
- (2) By computing the reparation award based on stevedoring costs at a port not served during the reparation period rather than the port served during the reparation period;
- (3) By denying interest both from the times of injury to the date of award, and from the date of the first reparation award.

(c) Respondents Federal Maritime Commission and the United States of America state the issues as follows:

- (1) Where the Court of Appeals remanded this case to the Commission "to consider whether, under all circumstances it is inequitable to force Flota to pay reparations, or at least inequitable to force [fol. 773] it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board," did the Commission, upon considering the equity of the award, as directed by the Court, properly reject Flota's claim seeking a reduction of, or elimination of reparations, on equitable grounds?
- (2) Did the Commission employ a lawful measure of damages in computing reparations?
- (3) In applying its measure of damages, did the Commission use accurate figures to represent gross



profit from sales of bananas; freight charges; and stevedoring and incidental expense?

- (4) Did the Commission err in denying Consolo interest from the date of each sailing from which he was unlawfully excluded, and in denying Consolo interest on the amount finally awarded (\$106,001.00) from 60 days after March 28, 1961, the date of the Board's first order awarding reparations to Consolo (\$143,370.98)?

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[fol. 774]

J. Alton Boyer, Attorney for Petitioner Flota Mercante Grancolombiana.

Robert N. Kharasch, Attorney for Petitioner Philip R. Consolo.

Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission.

Irwin A. Seibel, Attorney, Department of Justice.

[File endorsement omitted]

[fol. 775]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 18230

C.A. No. 18235

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FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED STATES  
OF AMERICA, Respondents.

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ADDENDUM TO PREHEARING STIPULATION—Filed December  
16, 1963

By typographical error, the parties omitted to include in the prehearing stipulation intervenor Philip R. Consolo's statement of the issues raised by Flota's petition for review, C.A. No. 18230. The following statement should be inserted directly below paragraph (3) under (b) on page 3 of the Prehearing Stipulation:

Intervenor Philip R. Consolo states the issues raised by Flota's petition as follows:

(4) When the Federal Maritime Commission had found that a common carrier by water had illegally excluded a shipper, did the Commission err in awarding reparations (upon remand from this court) in finding in accordance with the issue posed by the order of remand that it was not "inequitable" to force the carrier to pay reparations found to be due.

[fol. 776] (5) [Consolo takes the position that issue #2 stated by Flota is not timely raised and not in issue.]

J. Alton Boyer, Attorney for Petitioner Flota Mercante Grancolombiana.

Robert N. Kharasch, Attorney for Petitioner Philip R. Consolo.

Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission.

Irwin A. Seibel, Attorney, Department of Justice.

[File endorsement omitted]

[fol. 777]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

v.

FEDERAL MARITIME COMMISSION and  
UNITED STATES OF AMERICA.

No. 18,235

PHILIP R. CONSOLO

v.

FEDERAL MARITIME COMMISSION and  
UNITED STATES OF AMERICA.

Before: Burger, Circuit Judge, in Chambers.

PREHEARING ORDER—December 16, 1963

The prehearing stipulation of the parties and the addendum attached thereto, submitted pursuant to Rule 38(k)

of the General Rules of this court having been considered, the stipulation and addendum are hereby approved, and it is

ORDERED that the said stipulation and addendum shall control further proceedings in this case unless modified by further order of this court, and the stipulation and addendum shall be printed in the joint appendix of the parties herein.

Dated: Dec 16 1963

[File endorsement omitted]

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[fol. 778]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,230

FLOTA MERCANTE GRANCOLUMBIANA, S. A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and  
UNITED STATES OF AMERICA, Respondents,

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Before: Wilbur K. Miller, Wright, and McGowan, Circuit  
Judges, in Chambers.

ORDER GRANTING MOTION TO SUPPLEMENT PETITION  
FOR REVIEW—January 6, 1964

On consideration of petitioner's motion to supplement petition for review, of the memorandum of respondent Federal Maritime Commission in opposition thereto, of intervenor's answer to the motion, and of petitioner's reply to the answer, and it appearing that petitioner has lodged its supplement to the petition for review with the Clerk, it is

ORDERED by the court that the motion be granted, and the Clerk is hereby directed to file petitioner's supplement to the petition for review in this case.

Per Curiam.

Dated: Jan 6 1964

[File endorsement omitted]

[fol. 779]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and  
UNITED STATES OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

No. 18,235

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and  
UNITED STATES OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

On Petitions for Review of an Order of the Federal  
Maritime Commission.

[File endorsement omitted]

## OPINION—Decided December 17, 1964

*Mr. J. Alton Boyer*, with whom *Mr. Odell Kominers* was on the brief, for petitioner in No. 18,230 and intervenor in No. 18,235.

[fol. 780] *Mr. Robert N. Kharasch*, with whom *Mr. William J. Lippman* and *Mrs. Amy Scupi* were on the brief, for petitioner in No. 18,235 and intervenor in No. 18,230.

*Mr. David P. Simerman*, Attorney, Federal Maritime Commission, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Assistant Attorney General William H. Orrick, Jr.*, and *Messrs. James L. Pimper*, General Counsel, *Robert E. Mitchell*, Deputy General Counsel, Federal Maritime Commission, and *Irwin A. Seibel*, Attorney, Department of Justice, were on the brief, for respondents.

Before Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Washington, Circuit Judge.

Washington, Circuit Judge: This litigation is before us a second time. The background of the case is set forth in our first opinion, at 112 U.S.App.D.C. 302, 302 F.2d 887 (1962). In that opinion we concluded (1) that the Federal Maritime Board properly had before it the issue whether Flota had violated Section 14, Fourth, and Section 16, First, of the Shipping Act, 46 U.S.C. § 812 and 46 U.S.C. § 815, as well as the question whether Flota was a common carrier; (2) that the Board could properly find, as it did, that (a) Flota was a common carrier, (b) its contract with Panama Ecuador and its refusal to grant space to Consolo were unreasonable and unjust, and (c) it was therefore in violation of the Shipping Act; (3) that we have jurisdiction to review reparation orders to the extent necessary to determine their validity; (4) that the Board was within its discretion in (a) denying prejudgment interest to Consolo, (b) refusing to begin the reparation period before Consolo had requested from Flota a fair and equitable portion of space, and (c) selecting 18.46% as the percentage allotment of Flota's banana-carrying capacity and thus the

percentage of shipper's total computed net profit to which [fol. 781] Consolo was entitled; (5) that there was sufficient evidence to support a finding of competition between Consolo and Panama Ecuador. We did, however, hold that "the Board failed to give adequate consideration" to the question whether "the cumulative weight of all the circumstances . . . rendered it inequitable to require reparations." Our remand to the Federal Maritime Commission instructed it to consider this last question. *Supra*, 112 U.S.App.D.C. at 311; 302 F.2d at 896.<sup>1</sup>

In remanding we indicated our view that Flota had marshalled substantial evidence in support of its contention that the imposition of reparations would be inequitable. We indicated our view that the law was unsettled during the period for which reparations were assessed and said that the Board's conclusion that the law was settled by the *Grace Line* cases was a "doubtful assumption." We pointed out that the evidence of factual differences between Flota's situation and that of the *Grace Line* "might well lead to the conclusion that Flota in good faith believed that the *Grace Line* case was distinguishable." We also suggested that the time period of the Flota-Panama Ecuador contract might have seemed to be a reasonable one in light of the *Grace Line* decisions. We noted that Flota had reason to fear liability to Panama Ecuador had it complied with Consolo's demands for space in the absence of a declaratory order by the Board. Finally, we stated that "Flota . . . complained, with some justification, of the two-year delay of the Board in rendering a declaratory order," and that "The result here is that the Board is making Flota pay reparations for the period of the Board's delay." *Supra* at 311, 302 F.2d at 896. [fol. 782] These observations and expressions of opinion on our part were intended to serve as authoritative guide-

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<sup>1</sup> The Federal Maritime Board had by then been succeeded by the Federal Maritime Commission. See our earlier opinion: 112 U.S. App.D.C. at 304, n.1, 302 F.2d at 889, n.1.

The Commission's decision here under review is F.M.C. Docket No. 827 (Sub. 1), issued September 18, 1963.

lines for the further deliberations of the Commission, to which we remanded the case for further proceedings not inconsistent with our opinion. We had hoped that further analysis or findings by the Commission would throw light on our initial impressions. We were prepared to affirm the Commission if it could establish that the circumstances were such as not to make it unfair to assess damages against Flota.

The Commission's opinion, presently under review, suggested that Flota had not acted in good faith and concluded that substantial equities in its favor were lacking. A careful examination of that opinion, the evidence relied on by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignores not only the guideposts of our original decision but also the substantial weight of the evidence before it.

Notwithstanding our conclusion to the contrary, the Commission asserted that the law was not unsettled when Flota executed the contract with Panama Ecuador in May of 1957. Instead of considering whether Flota could in good faith believe that the structural differences in its ships would make a difference to the Board, the Commission asserted: "To rely upon their structural differences as an excuse to avoid common carrier obligations would go far toward eliminating such obligations." The Commission dismissed Flota's filing a petition for declaratory order as a self-serving act made to preserve appearances long after its wrongdoing. The Commission rejected our suggestion that Flota is being made to pay for the Board's own delay. It also rejected our suggestion that Flota might have believed in good faith that its three-year contract with Panama Ecuador would be acceptable to the Board, in view of the 1957 *Grace Line* opinion authorizing a two-year contract. The Commission said "we find it [fol. 783] impossible to understand how Flota could have held any such belief."

The reparation provision of the Shipping Act, 46 U.S.C. § 821, is not the ordinary mode for the Commission's



regulation of the shipping industry. The grant of reparations is discretionary. This agency, like the Interstate Commerce Commission, has a large range of enforcement powers to regulate its area of the economy.<sup>2</sup> If a party has good faith doubts about the applicability of a prior administrative adjudication to it, the party need not be its own judge. It can seek information from the agency about the applicability of the ruling to it. In our prior decision, we noted that "a primary purpose envisaged for it [a declaratory order by the agency] under the Administrative Procedure Act—[is] to assist a party in governing its conduct without rendering itself liable to suit. See Administrative Procedure Act § 5(d), 5 U.S.C.A. § 1004 (d)." *Supra* at 311, n. 15, 302 F.2d at 896 n. 15. If the course of action a party follows while the administrative determination is pending injures another and enriches itself, reparations to the injured party are frequently allowed. But if the course of action taken does not unduly enrich the party, and the asserted injury to another is only the loss of speculative profits, a real question arises whether reparations should be granted for the period of agency deliberation. Courts and agencies should be sensitive to the considerations of equity which may make reparations an inappropriate remedy in such cases.

[fol. 784] We think that an objective and rational examination of all the evidence reveals such equitable factors in this case. It seems clear that Flota entertained serious doubts as to its legal obligations when Panama Ecuador exercised its renewal option in May 1957 and when Flota rejected Consolo's demand for space in August 1957. Flota's petition to the Board for a declaratory order in October 1957 is strong evidence of its good faith. The Commis-

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<sup>2</sup> The reparations and other enforcement sections of the Shipping Act are closely modeled on the Interstate Commerce Act. S.Rep. No. 689, 64th Cong., 1st Sess. 13 (1916). Professors Jaffe and Nathanson note the decreased importance of reparations as an enforcement device in the Interstate Commerce Commission and the declining volume of reparations cases in that agency. JAFFE AND NATHANSON, *ADMINISTRATIVE LAW* 150-51, 389 (2d ed. 1961).

sion found that Flota could not have acted in good faith, since its legal obligations were clear under existing law. We do not agree. We consider Flota's conduct completely consistent with its asserted good faith belief that prior Board decisions did not compel it to break its contract with Panama Ecuador.

The reasonableness of Flota's behavior in 1957 must of course be viewed in the context of the legal situation which it was then confronting. The question facing Flota in May 1957 was not whether to undertake a new contractual obligation with Panama Ecuador, as the Commission implies, but whether to comply with its previously acquired contractual obligation to Panama Ecuador which had perfected its option for a three-year renewal under its 1955 contract with Flota. In 1955, at the time of the original contract, the only relevant Board statement was the 1953 *Grace Line* report. The report found Grace to be a common carrier of bananas and its exclusive contractual undertaking to be an unlawful discrimination, in violation of its statutory duty to apportion its facilities ratably among shippers; but the Board issued no order pursuant to its report. It discontinued the proceedings against Grace, even though Grace did not cancel its future booking contracts. Furthermore, the Board tacitly approved a two-year advance booking contract between Grace and the complainant Consolo despite the fact that the Board's report stated that six months was the "limit of reasonableness" for advance booking. 4 F.M.C. at 304. [fol. 785] In short, the Board discontinued its proceeding in the face of an arrangement at odds with the principles laid down in its report. The lack of precedential value of the 1953 *Grace Line* report is suggested by the Board's failure to cite it in its 1957 *Grace Line* decision, which dealt with substantially the same problem, except on a minor point as to the necessity of a tender. Under these circumstances, this report could hardly have been considered an "authoritative pronouncement," in 1955 or in May 1957, when the contract renewal option was exercised.

In deciding whether or not it was obliged to terminate its contract with Panama Ecuador in May 1957, Flota also had before it the Board's report of April 29, 1957, in the *Grace Line* matter, for such guidance as it provided.<sup>3</sup> This report, holding that Grace was a common carrier of bananas, rested primarily on the unprecedented theory that since bananas were "susceptible to common carriage," they could be carried by a common carrier only under terms of common carriage. Grace had rejected the demands of the two complainant shippers for space; the Board concluded that "the record discloses no convincing [non-discriminatory] reason why any of these parties were denied space." 5 F.M.B. at 284. But the Board held that "in view of the economic problems presented here," a two-year forward-booking system, excluding qualified applicants during the two-year period, was reasonable. It said that Grace must cancel its contracts with existing shippers and offer reefer space under two-year forward-booking arrangements to all qualified shippers. Although an appealable Board decision is valid until reversed, it would be an exaggeration to say that this decision settled [fol. 786] the law in the area and provided a reliable foundation on which private parties could confidently plan their actions. The Board's "susceptibility" theory was without precedent; the result was inconsistent with long-standing industry practice; and Grace promptly appealed the decision to the Second Circuit Court of Appeals.<sup>4</sup>

We are satisfied that Flota, faced with a threatened lawsuit by Panama Ecuador, acted on the basis of reasonable doubts whether its contract with Panama Ecuador

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<sup>3</sup> 5 F.M.B. 278. This report, issued April 29, 1957, was followed by an order issued August 19, 1957, see 5 F.M.B. 286. In May 1957 there was, of course, the possibility that the Board would not issue an order pursuant to its report, as in the first (1953) *Grace Line* matter.

<sup>4</sup> The decision was reversed by the Second Circuit and remanded. 263 F.2d 709. The Board subsequently found Grace to be a common carrier under a different theory, 5 F.M.B. 615 (1959), and the Second Circuit affirmed the decision over a strong dissent, *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790 (1960).

was prohibited by the Shipping Act.<sup>5</sup> Flota's counsel had good grounds to believe that the second *Grace Line* report, even if valid and binding, did not cover Flota's situation and did not require abrogation of the Panama Ecuador contract.

First, Flota might reasonably have believed that its situation was factually distinguishable from Grace's—that physical differences between Flota's ships and Grace's saved Flota's exclusive contract from being held an unreasonable discrimination. The Shipping Act prohibits [fol. 787] "unfair or unjustly discriminatory" contracts (46 U.S.C. § 812, Fourth) and the grant of "undue or unreasonable preference or advantage to any particular person" (46 U.S.C. § 815, First). The standard of violation has built into it the concepts of fairness and reasonableness; discrimination and preferences are not per se prohibited. Hence, an agreement that might be unreasonably discriminatory if entered into by one shipping company might be entirely proper, given a different factual setting, for another company. In stressing that the factual issues were crucial to the Board's decision in *Grace Line*, public counsel in his brief in the Flota case noted that the 1957 *Grace Line* decision

"held that the carrier's duties to banana shippers would depend upon the factual circumstances attending the loading, transportation, and discharge of the bananas."

The *Grace Line* decision clearly did not settle the matter of the shipping companies' obligations for the entire ba-

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<sup>5</sup> Flota's contract with Panama Ecuador contained the following clause:

"If any provision or term hereof be invalid or unenforceable for any reason, Grancolombiana [Flota] shall have the right to terminate this contract by giving seven (7) days' written notice of termination to lessee . . . ."

Of course, this provision did not relieve Flota of liability to Panama Ecuador if Flota guessed wrong and terminated a contract ultimately found to be valid, and Panama Ecuador had threatened legal action if Flota leased any of its space to Consolo.

nana shipping industry.<sup>6</sup> The physical differences between Flota's and Grace's ships would make it more difficult for multiple shippers to load and stow on Flota's ships and might so disrupt its schedules as to require it to forego the carriage of bananas.<sup>7</sup> That Flota's contentions in this [fol. 788] respect were far from frivolous is evidenced by respondents' justification, given in oral argument, for the Board's delay in acting on Flota's petition for declaratory judgment: "The complexity of the issues raised by Flota before the Board were not capable of resolution overnight; indeed, in reading the Examiner's decision on the violation phase of this proceeding, it goes into great detail over the loading problem and the refrigeration problem . . . ." <sup>8</sup> To suggest now that Flota could not have had a good faith belief that these differences were significant,<sup>9</sup> after lengthy hearings were required by the Board to satisfy itself whether or not they were dispositive, is

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<sup>6</sup> The Board held that Grace Line had not presented facts indicating that its discrimination was reasonable. It left open the possibility that, in some future case, another shipping company could show that its exclusive booking contract for the shipment of bananas was reasonable.

<sup>7</sup> It seems uncontroverted that Grace's vessels had two and three reefer holds each, only two decks in each hold, and permanent compartments, specially designed to carry bananas. Flota's single reefer hold was designed to carry frozen cargo and had, *inter alia*, three decks; no compartments, fewer and smaller side ports; steeper (and hence more difficult to use) exterior and interior ramps; heavy cumbersome hatch plugs; and greater problems of refrigeration, exhaust, opening, closing and leakage of air.

<sup>8</sup> In its decision, the Commission also justified its delay as necessary because of the "complex and lengthy hearing into the physical characteristics and utilization of its [Flota's] vessels so far as the banana trade was concerned."

<sup>9</sup> The Hearing Examiner in the 1957 *Grace Line* case noted that even as to Grace's superior facilities "*Consolo's* Ecuador manager is thoroughly convinced that utter confusion would exist were there a number of shippers of bananas." (Emphasis supplied.) And the Examiner here found that "the problems attendant upon the use of the Flota facilities may be more accentuated than those encountered by the shippers of bananas on the Grace vessels."

to ignore substantial justifications for Flota's course of action in May 1957.<sup>10</sup> [fol. 789] Besides its grounds for factually distinguishing the 1957 *Grace Line* case, Flota might have thought in good faith that its renewal agreement with Panama Ecuador was permissible within the standards set forth in the *Grace Line* decision. That decision states that once the shipping company has properly entered into a forward-booking agreement with one or more shippers for a reasonable period, qualified shippers who subsequently applied for space "would be foreclosed from any proration in the space until the end of . . . [the] given period." 5 F.M.B. at 285. Flota might reasonably have thought that its contract with Panama Ecuador was such a legitimate forward-booking agreement.

The Board's 1957 report in *Grace Line* stated that the duty to apportion space among several shippers arises "where the demand for space exceeds the supply." 5 F.M.B. at 284. That report left open the question of what efforts a steamship company must make to interest shippers in its space. It stated that a shipping company must provide "reasonable notice" before entering a forward-booking arrangement.<sup>12</sup> 5 F.M.B. at 286. Flota might

<sup>10</sup> It is worth noting that the banana shippers consolidated their shipments under a single operating corporation for purposes of shipping on Flota, after it opened its reefer space for multiple use in June 1959. This development lends credence to Flota's asserted belief that its reefer space was unsuitable for use by several shippers operating independently. Nothing in the 1957 *Grace Line* decision suggests that a shipping company whose ships *cannot*, as a matter of economic fact, be used for shipping by more than one banana shipper, must apportion its space among qualified shippers in the hope that they can arrange to unify their operations.

<sup>11</sup> The Second Circuit in *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790, 792 (1960), tacitly recognized the possibility that a carrier may enter into an exclusive contract where "there are no competing shippers for the space granted to a preferred shipper."

<sup>12</sup> The order, issued on August 19, 1957, after the Panama Ecuador renewal had been executed, is more specific. It states that Grace

"shall offer to its present shippers and to all qualified shippers . . . , upon a fair and reasonable basis and upon reasonable

[fol. 790] reasonably have thought that its actions in 1955 and 1957 satisfied the requirement of providing notice to other shippers. In 1955, just prior to its entering into the basic contract with Panama Ecuador, it advertised for shippers, but received no bids in response to its advertisements. In 1957, prior to Panama Ecuador's exercise of its option, on advice of counsel, Flota considered proposals from other bidders. Pursuant to this policy, Flota gave notice to Consolo on February 26, 1957, advising him to submit a bid for the refrigerated space by a given date. There was nothing in this letter suggesting that Consolo could only bid for Flota's *entire* refrigerated space. Consolo and another bidder bid only for the exclusive use of the entire space.<sup>13</sup> No bids for less than all the space were received. While the Board could reasonably insist that Flota's obligation was actively to solicit apportioned bidding rather than merely to accept offers for apportioned space, this issue was certainly not *settled* by either *Grace Line* report.

Furthermore, Flota could reasonably have believed that the three-year period in its contract with Panama Ecuador, made in compliance with its existing contract obligation and formalized after no bids for an allocation of space had been received, was reasonable under Board standards. The agency found it "impossible to understand" that Flota could, in good faith, entertain such a belief. Yet the Board had held Grace's two-year contracts to be of reasonable duration "in view of the economic problems presented here [in Grace's case]." Given Flota's previous unsatisfactory experience in selling its reefer space, compared to the vigorous competition among shippers for Grace's superior [fol. 791] facilities, the Board might well have found a three-year period to be permissible in Flota's case.

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notice, refrigerated space for the carriage of bananas . . . ."  
5 F.M.B. 287.

<sup>13</sup> We have already indicated that Flota incurred no liability for rejecting these bids. See 112 U.S.App.D.C. at 310, 302 F.2d at 895.



The above factors, in our view, justify Flota's doubts in May, 1957, as to whether it had a legal obligation to cancel its contract with Panama Ecuador.

On August 23, 1957, Consolo demanded a portion of the space on Flota's vessels, threatening legal action if Flota did not comply with its demands. Panama Ecuador threatened legal action if Flota leased any of its space to Consolo. Contrary to the Commission's assertion, there is no evidence to suggest that Flota was reluctant to repudiate its contract with Panama Ecuador "because it preferred the advantages of its long-term exclusive arrangement." Rather, in the face of pressures from both sides and uncertain as to its legal duty, Flota, on October 1, 1957, requested a ruling from the staff of the Board. Having received no answer to its request, on October 30, 1957, Flota petitioned the Board for a declaratory order. Not until six months had passed—on May 1, 1958—did the Board even assign a docket number to this petition; at that time it consolidated Flota's petition with Consolo's complaint seeking reparations, notwithstanding Flota's constant attempts to have its petition promptly determined, without introducing the complicated reparation issue.<sup>14</sup> We need not undertake a detailed examination of the specific incidents of delay. Suffice it to point out that the principal reason for much of the further delay until mid-November 1958, when Flota presented its case, was Consolo's insistence on consolidating its reparation claim with Flota's petition. Furthermore, regardless of the cause of the delay, the fact remains that virtually the entire period for which reparations [fol. 792] were assessed covered the time when Flota's petition for a declaratory order was pending before the Board. Confronted with a difficult choice on the basis of uncertain law, Flota had sought an administrative determination of its duties as promptly as possible. On the facts of this case, it would be inequitable to make Flota pay for the Board's delay in reaching a conclusion.

<sup>14</sup> Subsequently, on November 14, 1958, over a year after Flota first petitioned for a declaratory order, the trial examiner severed the reparation issue. A reparation order did not issue until March 30, 1961.



Despite these factors indicating the inequity of the assessment of damages against Flota under the circumstances, the Commission nevertheless declared that "Flota . . . is seeking to escape the consequences by passing the burden of its wrongdoing to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity." We think, however, that Consolo's position is hardly deserving of greater sympathy than Flota's. In the first place, the only "pecuniary brunt" which he bore was the loss of unrealized profits he might have made had he utilized the space which Flota failed to make available. Although Flota's action deprived Consolo of potential profits, there is no evidence that Flota in any way benefited by its exclusion of Consolo. The damages assessed by the Board are not designed to deprive Flota of illegal profits; indeed, they bear no relation to the profits Flota did or did not make on its contract with Panama Ecuador. The latter, the party which benefited from the allegedly illegal arrangement to the detriment of Consolo, was not compelled (by the nature of the remedy) to part with its "illegal" profits. In addition, Consolo himself for four years prior to the Board's 1957 *Grace Line* order (effective October 1, 1957), had received the pecuniary benefits of a preferential arrangement with Grace Lines, held to be unlawful. He was never compelled to give up those profits to shippers that had been excluded.

In view of the substantial evidence showing that it would be inequitable to assess damages against Flota in favor of [fol. 793] Consolo, we must conclude that the Commission abused the discretion granted it under Section 22 of the Shipping Act<sup>15</sup> in imposing reparations on petitioner. Accordingly, we reverse the Commission's decision of September 18, 1963, and direct it to vacate its reparation order issued thereunder.<sup>16</sup>

*So ordered.*

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<sup>15</sup> 46 U.S.C. § 821.

<sup>16</sup> In view of our disposition of this case it is unnecessary to consider petitioner's objection to the active participation of the Commission's counsel, who had earlier appeared before this court as an adversary, in the formulation and writing of the Commission's remand opinion.

[fol. 794]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,230

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Petitioner,

v.

FEDERAL MARITIME COMMISSION and  
UNITED STATES OF AMERICA, Respondents,

PHILIP R. CONSOLO, Intervenor.

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No. 18,235

PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION and  
UNITED STATES OF AMERICA, Respondents,

FLOTA MERCANTE GRANCOLOMBIANA, S.A., Intervenor.

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On Petitions for Review of an Order of the Federal  
Maritime Commission.

Before: Bazelon, Chief Judge, and Wilbur K. Miller,  
Senior Circuit Judge, and Washington, Circuit Judge.

JUDGMENT—December 17, 1964

These cases came on to be heard on the record from the  
Federal Maritime Commission, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged  
by this court that the decision of the Federal Maritime  
Commission on review herein is reversed, and these cases  
are remanded to the Commission with directions to vacate  
its reparation order issued thereunder.

Per Circuit Judge Washington.

Dated: Dec 17 1964

[File endorsement omitted]

[fol. 795]

SUPREME COURT OF THE UNITED STATES

No. 992, October Term, 1964

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PHILIP R. CONSOLO, Petitioner,

v.

FEDERAL MARITIME COMMISSION, ET AL.

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ORDER ALLOWING CERTIORARI—June 1, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is placed on the summary calendar and set for argument immediately following No. 606.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.